(This report has not been officially approved by the committee and, therefore, may not necessarily reflect the views of all of its members.)

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DRUG TESTING IN THE FEDERAL GOVERNMENT

A STAFF REPORT

PREPARED BY THE

SUBCOMMITTEE ON CIVIL SERVICE

OF THE

COMMITTEE ON POST OFFICE AND CIVIL SERVICE U.S. HOUSE OF REPRESENTATIVES

JANUARY 30, 1989

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ONE HUNDREDTH CONGRESS

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LETTER OF TRANSMITTAL

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December 23, 1988

Honorable William D. Ford
Chairman
Committee on Post Office and Civil Service
309 Cannon House Office Building
Washington, DC

Dear Mr. Chairman:

In 1986, the Committee released a report entitled "Drug Testing in the Federal Government." It was prepared by the staff of the Subcommittee on Civil Service.

Demand for the report has been great. The Subcommittee has sent out over 300 copies of the report in its typed, xeroxed form.

The report has been cited in several bibliographies on the issue of drug testing. My staff has prepared a foreword which briefly describes congressional and executive branch action on drug testing since the report was first issued.

I request that the Committee print the original drug testing report, together with the recently-prepared foreword section.

Thank you.

With kind regards,

Sincerely,

PATRICIA SCHROEDER
Chairwoman

FOREWORD

On June 20, 1986, the Committee on Post Office and Civil Service released its report on "Drug Testing in the Federal Government." The report was prepared to provide information for persons participating in the ongoing debate about expanded drug testing.

The report was released the day after University of Maryland basketball star Len Bias died of a cocaine overdose. The Congress was in session and members were in town as local news coverage highlighted the tragedy, with emphasis on the rapid spread of the new cocaine derivative "crack", for the next several weeks.

As the summer of 1986 progressed, anti-drug fever swept the capital. In that election year, the White House and Congress engaged in fierce competition to demonstrate to the American people the fervor of their opposition to drug use. At one point, nearly 60 anti-drug bills were pending in the Congress.

Frustrated by the law enforcement community's inability to dampen the drug trade through drug interdiction efforts, policy-makers turned to random drug testing as a solution. Yet, proposals to require random urinalysis of large segments of the population proved extremely controversial. Government leaders could find no public consensus that widescale drug testing -- of all applicants for driver's licenses, for example -- was the

correct approach. Accurate drug testing requires sophisticated equipment, trained operators, and a substantial cash outlay. Further, random drug testing cannot assure public safety, since existing drug testing technology cannot determine if an individual is currently impaired as a result of drug use.

Since the time the report was issued, the executive, legislative, and judicial branches of government have all tried to deal with the problem of drug abuse.

On September 15, 1986, President Reagan issued Executive Order 12564 [51 Fed. Reg. 32,889 (1986)]. The order requires Federal agency heads to establish drug testing programs. The word "random" does not appear in the Executive Order. Nonetheless, the Justice Department, at the direction of then-Attorney General Edwin Meese, made clear to Federal agency heads that random testing would be the only acceptable method to achieve the Administration's goal of deterring Federal employees from using drugs.

The Administration's policy was set despite the lack of a single study to determine whether there was a serious problem of drug abuse among the civilian Federal employee population. The only available studies surveyed drug use among active duty military members, many of whom are in the 18-22 year age group where drug use is more common. These studies indicate less drug use among active duty military personnel now than when the studies were begun in 1981. It

has not been determined whether the reduction in reported drug use is due to random urinalysis or to a general reduction in drug use among the targeted population.

Existing civilian drug testing programs do not indicate a drug abuse problem in the federal workforce. Since the Department of Transportation put its drug testing plan into operation in July of 1987, fewer than 1 percent of DOT employees tested have had positive test results. Among Customs Service employees, the positive rate is one-half of one percent of those employees tested.

The Office of Personnel Management (OPM) issued guidelines entitled "Establishing a Drug-Free Federal Workforce" on November 28, 1986 [FPM Letter 792-16]. OPM ordered each agency head to develop random drug testing for employees in sensitive positions, with mandatory penalties including loss of a job for a confirmed positive test or failure to consent to urinalysis. Under the Administrative Procedure Act, Federal agencies are required to abide by published regulations. Guidance of the sort OPM sent out is not legally binding on Federal agencies.

Federal agency heads faced a chaotic situation. The Administration demanded they establish random drug testing programs, yet this demand was not set out in legally-binding regulations. Further, in the early months of 1987, most agencies had no authority to spend appropriated funds on new drug testing programs.

On July 11, 1987, the President signed the Supplemental Appropriations Act of 1987 (Public Law 100-71). Section 503 of the Act had been offered by the Honorable Steny Hoyer (D-Maryland). It prohibited agencies from establishing new drug testing programs until the Secretary of Health and Human Services (HHS) submitted to Congress an agency-by-agency analysis of agency drug testing plans. In an attempt to enhance the reliability of agency drug testing programs, HHS was charged with developing comprehensive guidelines to assure that drug testing laboratories used state-of-the-art technology to analyze urine specimens; strict chain-of-custody procedures were also required.

Despite the Government's high standards, mistakes have occurred. In January 1988, a 52-year old air traffic controller with 18 years experience was temporarily removed from his job following a positive drug test. The employee's supervisor refused to accept the drug test results; the ensuing investigation revealed that the contractor doing the urinalysis had mixed up the urine samples. A formal apology was tendered. Had the employee been younger, with a less loyal supervisor, there is little doubt he would have been simply fired.

To avoid the potential for an employee in one agency being subject to drug testing while an employee holding the same job in another agency was not, the law required

uniformity of testing plans. Section 503 also required the HHS guidelines to be published with a 60-day period available for written comments.

On May 3, 1988, the Secretary of Health and Human Services submitted the Department's report. The Administration sent to Congress eleven, 3-inch, notebooks listing each and every position to be tested. However, the drug testing program was far from uniform. In some agencies, secretaries are to be tested; in most agencies, they are not. In some agencies, lawyers will fill urine cups, in others, they will not. Commerce plans to test meteorologists, the Pentagon will not. It appears that the process of putting together the list of covered positions was a matter of each bureau head or installation chief submitting a list. HHS "analysis" seems limited to xeroxing these lists and putting them into notebooks. In terms of procedures to be used, most agencies simply repeated the boilerplate language set out in the Department of Justice's model plan of September 25, 1987.

In its latest action on this issue, Congress required all government contractors to certify that they have "a written policy designed to insure that all of the workplace [is] free from illegal use of controlled substances," [section 628 of the Treasury-Postal Appropriations Act for 1989, Public Law 100-440, September 22, 1988].

Various Federal courts have issued a series of

conflicting decisions on random testing of federal employees, too numerous to cite here. A pattern has emerged in which a group of employees or one agency, or at one location or bureau within an agency, challenges the agency's ability to require them to submit to urinalysis. In most cases, the court decisions have been limited to the individuals bringing the suit. Some courts have permitted drug testing to proceed. Others have not. In a recent notable case, the U.S. District Court for the District of Columbia blocked the Justice Department from requiring its attorneys to submit to urinalysis. The judge ruled that in the absence of any evidence of a drug problem at the Department, "it is difficult to see how security ... or integrity ... would be much served by requiring compulsory random urinalysis drug testing of trusted and apparently law-abiding employees ...." (Harmon v. Meese, 690 F.Supp. 65 (D.D.C. 1988). On November 2, 1988, the Supreme Court heard oral argument in cases involving drug testing of U.S. Customs Service employees (National Treasury Employees Union v. Von Raab, (No. 86-1879)) and railroad employees (Burnley v. Railway Labor Executives' Association, (No. 87-1555)). Neither case involves random testing.

The 1986 staff report is being reprinted in the belief that the historical perspective it offers may be useful. All of the information contained in the report describes the status of agency drug testing programs, and congressional and judicial action prior to the issuance of Executive Order 12564 (1986), and the enactment of subsequent legislation.

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June 20, 1986

INTRODUCTION

American society, like many others, has a drug problem. This problem takes numerous forms:

* a responsible businessman gets drunk at happy hour after work and, while driving home, maims an innocent child;

* a freight train motorman smokes marijuana in his cab and becomes too stoned to respond to a signal alerting him to an oncoming passenger train;

* a high school student gets addicted to cocaine and turns to break-ins to support his habit;

* millions of Americans ruin their health and saddle society with huge unnecessary medical expenses by smoking tobacco;

* organized crime supports an underworld economy by importing illegal drugs.

Undoubtedly, society has a valid interest in curbing the use of all drugs: heroin, cocaine, marijuana, amphetamines, alcohol, and tobacco. Beyond the tragedy that alcohol and drug abuse wreaks on individual lives, the cost to society is high. Alcohol abuse is estimated to cost $89.5 billion per year in lost employment, reduced productivity, illness, and deaths and injuries from motor vehicle crashes. Abuse of other drugs is estimated to cost society another $46.9 billion per year. [Economic Cost to Society of Alcohol and Drug Abuse and Mental Illness, Research Triangle Institute, 1984.]

At the same time, society has additional priorities. Americans want a strong military, good education for their children, economic protection in their old age, roads, a multitude of other services, and low taxes. The amount of tax dollars which can be spent in the fight against drugs is determined through intensely fought budget battles involving elected representatives of the people.

Moreover, American society has certain fundamental values. We are a free society in which the government does not intrude in our lives without cause, in which we are presumed innocent until proven guilty, in which we have a right not to be forced to testify against ourselves. Our ancestors decided to break away from England largely to safeguard these values.

Were we to ignore these two constraints -- limited tax dollars and fundamental human rights -- we could promptly eliminate all drugs from American society. Yet, the American people have decided that the war on drugs should not be fought to the detriment of all other important values.

This staff report of the Subcommittee on Civil Service, Committee

on Post Office and Civil Service, United States House of Representatives, looks at the issue of drug testing of Federal government employees from this perspective. The subcommittee staff examined the far-reaching proposal of the President's Commission on Organized Crime that Federal employees be subject to drug testing. The staff also examined the drug testing policies of each Federal agency.

This report has not been formally approved by the members of the Subcommittee on Civil Service and, therefore, does not necessarily reflect the views of each member. The report is prepared to provide information for anyone participating in the ongoing debate about expanded drug testing.

THE PRESIDENT'S COMMISSION ON ORGANIZED CRIME

President Reagan issued Executive Order 12435 on July 28, 1983. This order established a Commission on Organized Crime and directed it to examine the nature and scope of organized crime in the United States, and to make recommendations concerning "appropriate administrative and legislative improvements and improvements in the administration of justice."

In March 1986 the Commission presented its report to the President. In it, the Commission concluded that "drug trafficking is the single most serious organized crime problem confronting this country." While not conceding that traditional law enforcement efforts have utterly failed to stop the flow of drugs into the United States, the Commission turned its attention to "a concerted nationwide campaign to reduce the demand for narcotics in the United States" to complement current law enforcement efforts. One recommendation which received extraordinary attention suggested that Federal employees, along with employees of government contractors, be subject to "suitable" drug testing. This was seen as essential to reducing the demand for drugs.

> The President should direct the heads of all Federal agencies to formulate immediately clear policy statements, with implementing guidelines, including suitable drug testing programs, expressing the utter unacceptability of drug abuse by Federal employees. State and local governments and leaders in the private sector should support unequivocally a similar policy that any and all use of drugs is unacceptable. Government contracts should not be awarded to companies that fail to implement drug programs, including suitable drug testing. No Federal, State, or local government funds should go directly or indirectly to programs that counsel 'responsible' drug use or condone illicit drug use in any way. Laws in certain States which 'decriminalized' the possession of marijuana constitute a form of such condonation, and should be reconsidered. [Report of the Commission, page 452.]

This recommendation is not clear. It talks about "policy statements" and "implementing guidelines" which should contain "suitable drug testing programs." All these documents and programs are supposed to be aimed at "expressing the utter unacceptability of drug abuse." How do guidelines contain a testing program? Is there a difference between drug use and drug abuse? What does the word "suitable" mean? That the tests should be reliable or that only certain employees should be subject to such tests?

Muddy language, such as this, in Commission reports is frequently attributed to the need to achieve consensus among a diverse group of commissioners. It is worth noting that this language failed to achieve consensus. A number of members of the President's Commission revealed that they were not asked to review the language of the final report and that they did not endorse the recommendation.

Representative Gary Ackerman, (D-New York), Chairman of the Subcommittee on Human Resources, Committee on Post Office and Civil Service, U.S. House of Representatives, attempted to clarify the meaning of this recommendation at a hearing he called shortly after the release of the report. The hearing was held on March 18, 1986. (Serial No. 99-46). The testimony of Rodney G. Smith, Deputy Executive Director of the President's Commission on Organized Crime, only obscured the search for the definition of "suitable." Mr. Smith testified that the recommendation meant only "suitable, not indiscriminate, not universal, not mandatory." Yet he went on to say that "if we have a suitable drug testing program imposed whenever it makes sense, that will reduce the demand for drugs. That will cut off the income to many of these drug traffickers who are among the most vicious organized crime people in the world. It's sure worth the chance."

Mr. Smith ignored the fact that in order to sufficiently reduce demand so that income to drug traffickers is cut off, many, many people will have to be tested, and on a random basis. Because of the technology of urinalysis drug testing, drug users can beat a testing program which involves prescheduled tests. The theory behind random testing is that if employees never know when they may be tested, they will never feel "safe" in using drugs, and that may reduce demand. However, random testing violates fundamental expectations of privacy in the performance of bodily functions, and raises the issue of protection under the Fourth Amendment to the Constitution.

The hearing did demonstrate just how unacceptable random and unexpected drug testing was to one Federal employee. When asked to provide a urine specimen for drug testing, Mr. Smith refused. Barbara Ann Rowan, a member of the President's Commission asserted that there was no "probable cause or reasonable suspicion to believe that his urine needs to be tested." The Commission's report would not have been subject to the widespread criticism it received had it said that testing should only be conducted if

there was probable cause or reasonable suspicion. Clearly, testing only on cause eliminates the deterrent effect which random, unscheduled testing contains. And, without this deterrent effect, drug testing is unlikely to have much impact on overall demand.

PENDING LEGISLATION

Representative E. Clay Shaw, Jr. (R-Florida) has introduced the only legislative proposals concerning drug testing of employees which are now pending in the House of Representatives. H.Res. 394 would make funds available from the contingent fund of the House of Representatives for a voluntary controlled substances testing program for Members of Congress, and officers and employees of the House of Representatives. The resolution is pending in the Committee on House Administration; no hearings have been held. This legislation is aimed at permitting Members to have the taxpayer pay for drug testing programs which the Members might set up in their own offices. Both Representative Shaw and Senator Paula Hawkins (R-Florida) have widely publicized their own congressional office drug testing programs.

H.R. 4636, also introduced by Representative Shaw, would require the implementation of a controlled substances testing program for civilian, military, and congressional employees and Members of Congress whose duties involve access to classified information. The bill is pending in three House Committees: Armed Services, House Administration, and Post Office and Civil Service. No hearings have been held by any of the Committees. This legislation would require tests of over half of the Federal workforce, since that many individuals hold clearances. According to information gathered by the General Accounting Office for 1983, some 2.7 million of the 5.1 million military and civilian employees of the Federal government have access to classified material.

No comparable legislation has been introduced in the Senate.

AUTHORITY TO REQUIRE DRUG TESTING

An individual does not waive his or her constitutional rights by coming to work for the Federal government. Indeed, the Supreme Court recently upheld its "responsibility . . . to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." Connick v. Myers, 461 U.S. 138, 147 (1983).

The authority under which Executive Branch agencies may require drug testing of employees is vague -- nothing in the Federal Personnel Manual or civil service law appears to authorize mandatory or random urinalysis drug testing of Federal employees, any more than it authorizes mandatory testing of employees for venereal disease, cancer, or contagious diseases like hepatitis. Yet, agency heads are given plenary authority to manage their own

agencies and the Office of Personnel Management (OPM) has general authority to set qualification standards. So, in the absence of constitutional or other statutory prohibitions, OPM or an agency manager can ordinarily set conditions of employment. Whether agreement to submit to random drug testing is a valid condition of employment is an issue of debate.

Federal Personnel Manual

The Office of Personnel Management, in cooperation with other Federal agencies and departments, has the responsibility to develop alcoholism and drug abuse prevention and treatment programs. Chapter 792 (Federal Employees Health and Counseling Programs) of the Federal Personnel Manual provides guidance to Federal agencies in establishing programs, such as alcoholism and drug abuse programs, that deal with employees' health in relation to their work.

Under Chapter 792, Federal agencies are authorized to provide only the following defined health services:

> (1) Emergency diagnosis and first treatment of injury or illness that become necessary during working hours
> . . . .
> (2) Preemployment examinations of persons selected for appointment.
> (3) Any in-service examinations of employees that the agency head determines to be necessary (in addition to fitness-for-duty examinations which are performed and under existing authority).
> (4) Administration . . . of treatments and medications . . . prescribed by a physician . . . .
> (5) Preventive services . . . to appraise and report work environment hazards, to provide health education, and to provide those specific disease screening examinations and immunizations that the agency head determines to be necessary.

Employee participation in health screening programs offered under Chapter 792 is strictly voluntary.

Some agencies offer urinalysis for reasons other than drug screening, for example, to detect exposure to hazardous chemicals, or as part of an agency-sponsored but voluntary physical examination under the auspices of the Public Health Service.

An agency may also order an employee to undergo a fitness-for-duty examination when there is some question about the employee's physical or mental ability to perform the requirements of the job. (5 C.F.R. 339.101, et. seq.) Some agencies use this authority to require testing if drug or alcohol abuse is suspected as a cause of an employee's deteriorating work performance. It is questionable whether an agency can use this authority to require drug testing of employees where there is no reasonable suspicion

that an individual employee is using drugs.

Department of Defense Directive 1010.9

Agencies within the Department of Defense (DOD) rely on more specific authority to require drug testing of civilian employees. DOD Directive 1010.9, the "DOD Civilian Employees Drug Abuse Testing Program," was issued on April 8, 1985. It was modeled after the drug abuse testing program established for members of the military services (DOD Directive 1010.1, December 28, 1984).

DOD Directive 1010.9 limits drug testing to employees in designated positions. It defines certain jobs as "sufficiently critical to the DOD mission or protection of public safety that screening to detect the presence of drugs is warranted as a job-related requirement." Each DOD Component must identify critical jobs within the following categories:

(1) law enforcement;

(2) "Positions involving the national security or the internal security of the Department of Defense in which drug abuse could cause disruption of operations, destruction of property, threats to the safety of personnel, or the potential for unwarranted disclosure of classified information.

(3) "Jobs involving protection of property or persons from harm."

Urinalysis testing of applicants and employees in positions that have been designated as critical may be required (1) before appointment to a critical position; (2) periodically on a random basis; (3) when there is probable cause to believe that an employee is under the influence of a controlled substance while on duty; and (4) as part of a safety investigation authorized by the Department.

At the present time, the Army's plan to test civilian employees has been approved; the Navy and Air Force are expected to submit plans in 1986. To date, the relatively inclusive language defining the categories of employees which can be subject to drug testing has been construed quite narrowly. Only Army or Navy employees who have actual contact with nuclear weapons, and those who work in drug rehabilitation programs have been made subject to such testing. The planned expansion of the program raises serious questions.

AGENCY PROGRAMS

The Subcommittee on Civil Service, on February 6, 1986, sent a questionnaire to all Federal agencies. Specific answers to each question are contained at the end of this report. The information on current government programs comes from the responses to this questionnaire.

Several Federal agencies currently or will within the immediate future require drug testing of certain employees, and three

agencies are in the early stages of planning a drug testing program. Yet, over three-quarters (80%) of Federal agencies do not require urinalysis screening for drug use and have no plans to implement such a program.

Agencies Testing Now or Within Immediate Future

Department of the Air Force is in the process of developing a urinalysis program for civilian employees in critical positions. The Air Force plans to test urine specimens for drugs but does not plan to test for alcohol. No final regulations have been developed to date.

Department of the Army is currently testing treatment staff in Alcohol and Drug Counseling Centers and employees in the Forensic Drug Testing Laboratories. The Army was authorized to begin testing civilian employees on February 10, 1986, and plans to expand the testing program to all employees in certain critical positions by mid-June 1986. The Army will test for drugs but not for alcohol. Employees are required to sign consent forms in which they agree to submit to future random testing. [Form 5019-R, "Condition of Employment for Certain Civilian Positions Identified as Critical Under the Drug Abuse Testing Program."] The Army estimates that approximately 10,000 individuals will be covered under the program. Employees who test positive on an initial test will be temporarily removed from their critical position; no final action will be taken unless and until a confirmatory test also is positive.

The National Federation of Federal Employees (NFFE), on March 21, 1986, filed a motion for a preliminary injunction to prevent the Army from implementing its testing program for employees in critical jobs. NFFE asserts that the testing program violates the Fourth Amendment's prohibition against unreasonable search and seizure, and violates due process rights since an employee could be temporarily removed from a position on the basis of one unconfirmed positive test result.

Department of the Navy began urinalysis testing in November 1983 of civilian mariners in its nuclear weapon-related Personnel Reliability Program. The Navy plans to expand the program to all employees in certain critical positions: law enforcement, firefighting, air and sea traffic control positions and positions in ships and aircraft. The Navy will test for drugs; it currently uses breathalyzer tests on-post as part of the DOD drunk driver program.

Department of Defense Components: the Army program has been approved; the Air Force and the Navy are expected to submit programs for approval in 1986. No other DOD Components are expected to submit a program in 1986. A DOD component is authorized to test for specified drugs; alcohol is not part

of the urinalysis testing program.

Department of Justice has no comprehensive drug testing program for employees at this time, but four components within the Department (Federal Bureau of Investigation, U.S. Marshals Service, Bureau of Prisons, and Offices, Boards and Divisions of the Department) conduct case-by-case testing where there is reasonable suspicion of employee use of illegal drugs. Applicants for the position of border patrol in the Immigration and Naturalization Service and hazardous duty positions in the Bureau of Prisons are tested prior to employment. The Drug Enforcement Administration has no employee drug testing program at the present time, but is planning to implement a program requiring mandatory testing of applicants and random testing of current employees.

Department of Transportation has no agency-wide urinalysis program, but the Federal Aviation Administration (FAA) is developing a program to require urinalysis screening of employees and is currently considering contract bids. The Department anticipates that the program will test for both alcohol and drugs. While no formal program is currently in effect, the FAA does require urinalysis of employees where there is probable cause that the employee had used illegal drugs.

Department of the Treasury: (1) Applicants and probationary employees of the Uniformed Division of the Secret Service are subject to urinalysis screening as part of a probationary physical examination. The urinalysis is administered by the District of Columbia Police and Fire Clinic. The Clinic does not routinely test for marijuana or alcohol.

(2) The U.S. Customs Service plans to implement a urinalysis drug screening program in the summer of 1986. Applicants for certain positions, including employee applicants, will be required to submit to urinalysis as a condition of employment. In a March 13, 1986, letter to the National Treasury Employees Union (NTEU), Customs Commissioner William von Raab announced plans to expand the program "to include the random and unscheduled testing of current employees in positions covered by the program."

The National Treasury Employees Union filed suit on May 28, 1986, to enjoin the U.S. Customs Service from implementing its urinalysis testing program. NTEU challenges the program as violating employees' Fourth Amendment protections since random testing may be done without probable cause and without any particular suspicion that an individual employee is using drugs.

Central Intelligence Agency started a trial program on January 3, 1986, to screen all applicants for agency employment for drug use by urinalysis; applicants are also screened for alcohol.

There is no formal program requiring urinalysis for drug screening for agency employees at this time.

National Aeronautics & Space Administration (NASA) tests all astronaut applicant finalists as part of a comprehensive medical examination; no other NASA employees are subject to urinalysis testing. NASA alone among Federal agencies tests for such substances as caffeine, nicotine, acetominophen; candidates are not tested for alcohol.

Panama Canal Commission began testing employees on November 5, 1985, as part of a preemployment physical, upon reasonable suspicion that the employee is impaired by the use of drugs or alcohol, or as part of an accident investigation. The Commission requires both drug and alcohol testing.

U.S. Postal Service screens applicants in certain areas of the country for drug use but not for alcohol; it has no policy to test employees either systematically or randomly and no definite plans to do so. The Postal Service may test an employee as part of a fitness for duty examination.

On February 28, 1986, Community Legal Services in Philadelphia and the American Civil Liberties Foundation filed a class action suit against the Postal Service on behalf of 11 applicants for postal employment. The suit alleges that the policy which requires mandatory testing of applicants is demeaning, infringes upon their right to privacy, and is totally unrelated to actual job performance.

Tennessee Valley Authority's Office of Nuclear Power implemented a drug screening program on August 1, 1985, that included breath tests for alcohol and urinalysis testing of (1) prospective employees prior to employment and employees who are transferring into the nuclear power program from other TVA organizations; and (2) in cases of suspected drug use or possession on TVA nuclear power and construction sites. TVA plans to implement random testing of current employees in 1986.

Veterans Administration authorizes urinalysis testing of employees at VA Drug Dependence Treatment Centers.

Agencies in Early Planning Stages

Three agencies plan to begin drug testing of employees, but have not yet developed specific programs:

Department of Energy currently has no mandatory urinalysis testing program for Federal employees. The Department of Energy reports, however, that in its nuclear weapons construction program "several of the Department's contractor-operated facilities have initiated a urinalysis testing program both for preemployment screening and for routine screening. These

corporate sponsored programs have not been initiated in response to either DOE policy or Departmental Orders. The DOE is in the process of developing a Human Reliability Program for selected personnel employed at critical nuclear facilities. Drug testing through urinalysis testing is being examined as a potential component of this program."

General Services Administration has no urinalysis program for Federal civilian employees. "However, GSA is reviewing the need for the establishment of a urinalysis program for contract security guards. This testing program has not been finalized."

Nuclear Regulatory Commission has no current policy requiring testing. However, NRC licensees "may elect to have mandatory chemical testing of all personnel" working in vital areas of nuclear power plants. "Since a number of NRC employees also have access to vital areas . . . the Commission's Staff is now addressing the question of an appropriate Fitness for Duty Policy which would apply to NRC employees. Accordingly, we are now gathering background information on how urinalysis testing programs are being implemented in selected Federal agencies with public health and safety responsibilities."

Agencies With No Drug Testing Program

The following agencies answered the subcommittee's questionnaire by stating that they have no urinalysis program for drug screening and no plans to institute such a program in the near future:

Department of Agriculture
Department of Commerce
Department of Education
Department of Health & Human Services
Department of Housing & Urban Development
Department of the Interior
Department of Labor
Department of State
ACTION
Administrative Conference of the U.S.
American Battle Monuments Commission
Appalachian Regional Commission
Board for International Broadcasting
Commission on Civil Rights
Commission of Fine Arts
Commodity Futures Trading Commission
Consumer Product Safety Commission
Environmental Protection Agency
Equal Employment Opportunity Commission
Executive Office of the President
Export-Import Bank of the U.S.
Farm Credit Administration
Federal Communications Commission
Federal Deposit Insurance Corporation

Federal Election Commission
Federal Emergency Management Agency
Federal Home Loan Bank Board
Federal Labor Relations Authority
Federal Maritime Commission
Federal Mediation & Conciliation Service
Federal Reserve System
Federal Trade Commission
General Accounting Office
Inter-American Foundation
Interstate Commerce Commission
Merit Systems Protection Board
National Archives & Records Administration
National Capital Planning Commission
National Credit Union Administration
National Endowment for the Arts
National Endowment for the Humanities
National Labor Relations Board
National Mediation Board
National Science Foundation
National Transportation Safety Board
Occupational Safety & Health Review Commission
Office of Personnel Management
Office of Special Counsel
Peace Corps
Pennsylvania Avenue Development Corporation
Pension Benefit Guaranty Corporation
Postal Rate Commission
Railroad Retirement Board
Securities & Exchange Commission
Selective Service System
Small Business Administration
U.S. Arms Control & Disarmament Agency
U.S. Information Agency
U.S. International Trade Commission

TECHNOLOGY

Technology has solved many of society's problems. Yet, the laws of physics determine what technological advances can accomplish. In the case of drug testing, technological innovations allow us to know, with a fairly high level of confidence, whether someone has used a specified drug in the last three or four days, if the most advanced forms of testing are used and are applied in a controlled environment by skilled technicians. Such tests reveal nothing about earlier use, level of use, or current intoxication.

One major drawback to urinalysis testing for drug use is timing. Unlike a breathalyzer test for alcohol, current technologies cannot determine present drug intoxication; in terms of worksite safety, urinalysis has value only as a deterrent. Urinalysis is fairly accurate in determining recent use of such drugs as cocaine, PCP, amphetamines, barbiturates, and heroin, but the residues of these drugs stay in the body for only two to five

days. (Marijuana is the only drug in which metabolite residues may stay in the body for up to 30 days.) If the urine sample is not taken within approximately 48 hours after drug use, all traces of the drug may have been excreted, and subsequent urinalysis will reveal no traces of drug use. Thus, to thwart a routine testing program, a drug user would simply refrain from using drugs for a few days or weeks before the scheduled test.

If an employee comes to work each day with the fear that he will be subject to urinalysis, perhaps he will avoid drugs, except over long weekends. But such random tests are offensive. If a supervisor or co-workers have no reason to suspect that an employee is using drugs, if the employee's performance is not deteriorating, why should the agency subject the employee to the humiliation of having someone watch the collection of the urine specimen, and spend the money to have the sample analyzed?

Nor does urinalysis indicate whether use of a drug resulted in any impairment of the employee's ability to perform his or her job. Indeed, at the time of greatest impairment, the test may well turn up negative. This is because many drugs take a period of six or eight hours to go from ingestion to urine. A urine sample collected an hour after an individual inhales cocaine is likely to be negative. In commenting on a Navy plane crash in which traces of marijuana were found in the bodies of some of the deck crew, Navy Secretary John Lehman said the use of marijuana "'does not establish in any way that any of these men were in the least impaired in the performance of their duty.'" (New York Times, June 19, 1981)

Methods of Testing

Several types of screening tests have been developed to test for the presence of drugs or their metabolites in urine. Among the most commonly used tests are the following:

EMIT

EMIT (Enzyme Multiplied Immunoassay Technique)is manufactured by the Syva Company. In decribing the use of the EMIT test for marijuana, the manufacturer's literature states the following:

> The Emit Cannabionoid 100 Assay is designed to detect the major urinary metabolite of delta (9)-THC. Because psychoactive effects do not correlate with urinary metabolite levels and because variations in absorption, distribution, method of ingestion, and urinary volume, a positive result from the assay of urinary THC metabolites indicates only use of cannabinoids and does not indicate or measure intoxication.
>
> The Emit assay is a homogenous enzyme immunoassay technique used for the microanalysis of specific

compounds in biological fluids. When an Emit assay is performed, urine is mixed with two reagents: Reagent A contains antibodies to a particular drug; Reagent B contains a drug derivative. Reagent A is added to the sample first, and the antibody binds to the drug it recognizes. Reagent B is added next, and the enzyme-labeled drug combines with any remaining binding sites; this binding decreases the enzyme activity. Some enzyme remains unbound and therefore stays active in the reaction mixture. This residual enzyme activity relates directly to the concentration of drug in the sample. The active enzyme converts [chemically], resulting in an absorbance change that is measured spectrophotometrically.

The spectrophotometer measures the absorbance of each sample twice - 15 and 45 seconds after the sample enters the flow cell. The change in absorbance over the 30-second period is used to calculate results.

The Emit Cannabinoid Assay Low Calibrator, which contains a stated concentration of 100 ng/ml [nanograms (a billionth of a gram) per milliliter of urine], is used to distinguish positive from negative samples. A sample that gives a value equal to or higher than the low calibrator is interpreted as positive: it contains cannabinoids. A sample that gives a value lower than the low calibrator is interpreted as negative: either there are no cannabinoids in the sample or they are present in low concentrations that are undetectable by this test.

If not analyzed within 24 hours, urine samples should be stored frozen at approximately -12 C. Improperly stored samples ... may give questionable results.

Syva recommends confirmation of positive results.

Syva's literature states that the assay can be used with a 95% confidence rate. Yet, in a 1981 study of the EMIT Cannabinoid Assay, when samples initially identified as positive by EMIT were analyzed by radioimmunoassay or gas chromatography/mass spectrometry, confirmation rates ranged from 80% to 95%. [Journal of Analytical Toxicology, Vol. 5, July/August 1981]. Thus, between 5% and 20% of the specimens which initially tested positive by EMIT were not confirmed by other testing methods. With a potential test error rate of up to 20%, the issue is raised whether an agency risks litigation if it removes an employee on the basis on an initial positive test.

Further, the Journal of Analytical Toxicology study noted "the EMIT Cannabinoid Assay is designed as a rapid primary [emphasis added] screening system but any positive result should be confirmed by an alternate technique." The issue is then raised whether an agency may properly use EMIT as a confirmatory test when the initial test has been performed by another method such as thin-layer chromatography.

EMIT was designed to be an inexpensive urinalysis testing mechanism. Costs are estimated to be between $6 and $15 per test. EMIT is unusually reliant on the skill of the technician, in maintaining the appropriate environmental conditions, in mixing the proper level of reagents, and in comparing color intensity between the mixed sample and the pre-mixed sample, known as the calibrator. While EMIT is relatively inexpensive, it is also not very useful.

Violations of environmental constraints and poor technique can produce false negatives as well as false positives. The false positive error rate can be measured through confirmatory testing. The false negative rate is rarely calculated for EMIT or other tests because it involves providing blind, known content sample to the testing lab. Most students of urinalysis argue that there are far more false negatives than false positives. And, it is not clear that the urine of an occasional drug user is more likely to produce a false negative than the urine of a heavy drug user.

While false negatives do not result in false accusations the way false positives do, they do raise special due process protections. Since samples that appear negative on the EMIT test are not subject to confirmatory testing, the individuals who provided such samples are never suspected of drug use. Two individuals with identical drug consumption patterns can have opposite results on the test. Is it appropriate to take strong punitive action against one and never suspect the other as a result of the arbitrary imperfections of the EMIT test?

Radioimmunoassay (RIA)

A somewhat more sophisticated test than EMIT is RIA, a process which involves the use of antigens to the target drug metabolite which are tagged with radioactivity to allow for easy reading.

According to information provided by the Department of the Air Force, a predetermined amount of an antigen labelled with a radioactive signature and an antibody to the drug being tested for are mixed with a urine sample in a test tube. The radioactive antigen competes with the target drug for the antibody. After equilibrium is reached, the bound drug is separated from the free drug. A separate antibody is then used to precipitate out the bound drug. After pouring off the liquid free fraction, the radioactivity left in the tube is measured. The amount of radioactivity left in the tube depends on the concentration of the drug in the urine. The sample is analyzed by comparing the

radioactivity of known drug standards to the unknown radioactivity of the sample. With this initial test, samples are identified as presumptively positive or negative.

The Abuscreen system developed by Roche Diagnostics, Inc., is one type of radioimmunoassay. The manufacturer's insert states that the Abuscreen RIA has a confidence rate of 99%, but also emphasizes "a positive test result should be confirmed by another generally accepted nonimmunological method such as GC or GC/MS."

The cost for RIA analysis is approximately $15 to screen for two drugs. While RIA is somewhat less sensitive to environmental and technical factors than is EMIT, it is still easily mishandled. Instead of visual inspection of test samples to predetermined standards, RIA uses radiation measuring devices to determine whether the sample is positive or negative. Obviously, the proper calibration of such machines is essential for testing accuracy.

Thin Layer Chromatography (TLC)

Thin layer chromatography is a technique not widely used in the Federal government. Under this technique, drugs are extracted from the urine with a solvent; then the extract is placed on a thin-layer chromatography plate. Drug presence is determined by spots of color and distance from a starting line, compared to drug spot standards on the TLC plate. This is a more subjective test than EMIT or RIA, and places greater reliance on the skill and judgment of the technician.

Gas Chromatography/Mass Spectrometry (GC/MS)

A combination of the techniques of gas chromatography and mass spectometry creates the state-of-the-art analytical technique for screening urine for the presence of drugs. It is the most frequently recommended test to confirm samples which were positive on an initial screening. GC/MS is particularly useful as a confirmatory test because a printed record is made of the test results, so an expert can look at the documentation and determine if the test was done correctly.

According to the Department of the Air Force, the test is performed by taking a separate measure of urine from the original sample and injecting it into the GC/MS machine. The gas chromatograph portion of the instrument separates drugs by retention time, which is the time it takes for a drug to travel from the injection port to the detector on a preselected column under specific conditions of temperature and flow rate. The sample which comes off the gas chromatograph is ionized by electron bombardment. Positive ion mass fragments which are formed are then separated by the mass spectrometer according to their mass and charge. Each drug shows a breakdown or fragmentation pattern which is specific for that drug. Thus, the GC/MS provides a fingerprint from which the type of drug can be identified. In addition, the amount of drug present in the urine

is quantified by the GC/MS machine.

GC/MS test costs range from about $30 to $65 per sample. Under proper quality control procedures, such as those set by the Armed Forces Institute of Pathology, the percentage of false positive readings under GC/MS is quite low. Nevertheless, that is a big "if". Temperature, pressure, and storage time of the samples have to be rigidly controlled. The machine has to be thoroughly cleaned between each test. Private labs, which are paid fixed amounts for each test, have an economic incentive to skimp on the expensive environmental controls and machine maintenance which the tests require for accuracy. In actual practice, therefore, the false positive rate can be significantly higher than it would be if all quality control procedures were rigidly observed.

Problems

As with any technology, there are problems with urinalysis testing. Test results can be affected by the body weight of the individual being tested, how much liquid he or she consumed prior to the test, or whether certain foods or over-the-counter medications were taken. The poppy seeds on the 1.5 billion Burger King hamburgers sold each year could cause positive results in tests for opium. The cold preparation, Contac, has caused false positive results on some tests.

If agencies mail urine samples to laboratories for analysis, the temperature at which samples are stored in transit can affect the test result. Degradation of positive urine samples can occur if urine is not stored at temperatures near -12 decrees Celsius, for marijuana tests. For some reason, mere refrigeration is required for the cocaine test. If an agency in a warm climate mails its samples to a laboratory, the samples may deteriorate so much that individuals who use drugs will test negative.

Another major problem is the quality of the laboratory performing the analysis. Problems with quality control and chain of custody are the most frequent. In a quality-control study by the Centers for Disease Control (CDC) of 13 private laboratories, error rates on samples incorrectly identified as containing drugs (false positives) ranged from 0% up to 66%. Error rates on samples containing drugs ranged from 0% to 100%. [The Journal of the American Medical Association (4/26/85)]. Similarly, samples can be mixed up, or pipettes and other lab equipment not cleaned properly can contaminate drug-free samples. The CDC study reported a substantial number of "sink tests," where the sample is poured down the drain and the results characterized as negative.

The Defense Department experienced several chain of custody problems, so much so that "[i]n 1984, the Air Force notified 6,500 military personnel who were discharged from the service or faced drug charges that their positive drug tests may have been wrong." (New York Times, April 17, 1986). The Washington Post reported in 1984 that "97 percent of the urinalysis tests examined at Fort

Meade, Maryland, were 'not scientifically and legally supportable' in proving marijuana or hashish use." A blue-ribbon panel of Army and civilian experts were particularly concerned with "'inadequate, sloppy and poorly documented' records, an 'inadequate' attitude toward security in the test areas, and 'inadequate staffing' in the labs.'" (Washington Post, 4/27/84) The Department of Defense has since instituted strict quality control and chain of custody procedures for its testing program. Yet, the contract currently under consideration at the Department of Transportation would allow unlicensed technicians to perform the tests, as long as their supervisors were licensed.

A final problem concerns the accuracy of mass testing on a population where there is no evidence of extraordinary drug use. For example, in a memorandum to employees concerning the Customs Service drug testing program, Commissioner von Raab stated, "the extent of illegal drug use by Customs employees was not the reason for establishing this program." (May 8, 1986) Under the best scenario (assuming that the tests used have an accuracy rate of 95%), there is still that 5% who will be incorrectly identified as drug users. Five percent of the Federal workforce is 140,000 individuals (using 2.8 million as the base) whose careers and reputations could be ruined by false determinations of drug use. With test error rates potentially as high as 20%, over one-half million Federal workers could be falsely accused of using drugs.

Moreover, our society has not decided that drug testing employees is the best way to spend our tax resources. The most accurate test procedures are the most expensive. A sample which initially tested positive by EMIT or RIA and was confirmed by GC/MS could cost about $100 per sample in lab costs. Administrative costs of gathering and labelling samples, administering the program, and taking action against employees tested as positive adds to the potential costs. A once a year test of 2.8 million Federal employees could cost the government nearly $300 million. If, instead, the emphasis were on stopping the flow of drugs into the country, the government could hire over 12,000 Federal Bureau of Investigation, Drug Enforcement Administration, and Customs Service agents at annual salaries of $25,000 for the same amount of money.

LEGAL ISSUES

The Armed Forces began testing soldiers returning from Vietnam for drug use in 1971, with an emphasis on rehabilitation. In 1981, the emphasis turned to discipline after traces of marijuana were found in the bodies of several sailors killed when a plane crashed on the aircraft carrier Nimitz.

Federal employees, like other citizens, are protected by the Fourth Amendment to the United States Constitution, due process guarantees, the merit principles of the civil service (5 U.S.C. 2302(10)), and the anti-discrimination provisions of the Rehabilitation Act of 1973 (29 U.S.C. 791). Imposing mandatory

and random urinalysis on members of the military raises different legal questions than imposing such testing on civilian employees.

Search and Seizure

The Fourth Amendment to the Constitution protects the privacy of individuals from unreasonable searches and seizures. Individuals have every right to expect privacy in discharging and disposing of their urine, yet valid urinalysis procedures require that an observer watch while the urine sample is collected. The courts have ruled that the government's taking of a urine sample is a seizure within the meaning of the Fourth Amendment. Allen v. City of Marietta, 601 F.Supp. 482 (N.D.Ga. 1985). But, only unreasonable searches are prohibited. The question then becomes whether urinalysis testing of Federal employees is unreasonable when the government's interest is balanced against the individual's expectation of privacy.

The courts have consistently held that some reasonable suspicion of drug use is required before an individual government employee can be required to undergo urinalysis testing. Jones v. McKenzie, 628 F.Supp. 1500 (D.D.C. 1986); Allen v. City of Marietta, supra. One court has set a more elaborate standard: urinalysis can be required "only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the employee is then under the influence of alcoholic beverages or controlled substances." McDonnell v. Hunter, 612 F.Supp 1122 (D.C. Iowa 1985). The McDonnell case involved regulations which permitted random testing of the type the Presidential Commission seemed to envision.

Even public safety considerations do not outweigh the individual's expectation of privacy where there is no probable cause or reasonable suspicion that the individual is using drugs, Jones v. McKenzie, supra.

The government is allowed to investigate its employees' performance-related problems, and courts have found drug testing of government employees reasonable when the employee was involved in an accident or suspected of being intoxicated or under the influence of drugs. Federal Railroad Administration regulations authorize urine and blood testing following an accident -- although one pending case involves forced testing after a train was hit by a tornado. The Seventh Circuit has upheld blood and urine testing of bus drivers involved in serious accidents or suspected of being under the influence. Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d.1264 (7th Cir. 1976), cert. denied, 429 U.S. 1029 (1976).

Courts have found drug testing reasonable as part of a pre-employment physical examination or any routine physical examination that is required of all employees.

One question that may soon be ripe for litigation concerns the validity of an employee's advance consent to a search (urinalysis) as a condition of employment. For example, as part of its urinalysis program for civilian employees in critical positions, the Army requires a signed consent to random urinalysis as a condition of employment. In the McDonnell case, the court invalidated a similar consent form, stating "the consent cannot be construed to be a valid consent to any search other than one that is, under the circumstances, reasonable and, therefore, permissible under the Fourth Amendment. Public employees cannot be bound by unreasonable conditions of employment [cite omitted]. Advance consent to future unreasonable [emphasis in original] searches is not a reasonable condition of employment." An applicant for a critical position in the Army may raise this question: if the random testing part of the Army's urinalysis program (not based on probable cause) is unreasonable, then is there any validity to the required consent form? Also, since the applicant will not get the job if he or she does not sign the form, it may well be not a sufficiently "voluntary" consent to waive Fourth Amendment rights.

The constitutional prohibition against an unreasonable search and seizure is rooted in a fundamental expectation of privacy. Nevertheless, the Privacy Act merely refers to government systems of records and does not apply to this case.

With these precedents, the question is raised whether the type of wide-scale, random testing contemplated by the Army, the Drug Enforcement Administration, the U.S. Customs Service, and other Federal agencies would be struck down by the courts as violating the employee's Fourth Amendment rights.

Due Process

The Constitution's due process guarantees must also be considered. In Jones v. McKenzie, a Washington, D.C., school bus attendent was fired on the basis of a single, unconfirmed positive test and without a hearing. She sued the city and won. The court made the following points: (1) an employee cannot be removed on the basis of a single unconfirmed test. A confirmatory test by an alternative method is required to avoid the determination that the firing was arbitrary and capricious. (2) Procedural due process requires that a government employee be provided notice and an opportunity for a hearing before being fired. The court suggested that an appropriate procedure would include, at a minimum, chain of custody information to determine that the individual is in fact the subject of a particular positive test, and proper confirmatory testing.

The Department of Defense has developed one of the most comprehensive testing programs to date. With the exception of the random testing provision, the DOD guidelines authorize testing as part of preemployment physicals or where there is some sort of particularized suspicion that the individual is using drugs. Its

regulations provide that an employee can be temporarily removed from his or her position on the basis of an initial positive test, but that no final action can be taken unless the test is confirmed positive, and the employee must be restored if the test is not confirmed. In cases of confirmed positive test results, the adverse action provisions of chapter 75 and chapter 43 of title 5 would apply, although not to employees in excepted service positions. The standard for removal under an adverse action procedure is that the removal is for "the efficiency of the service." (5 U.S.C. 7513). If off-duty drug use has no effect on on-the-job performance, how can a removal based on a positive test be supported under the efficiency of the service standard? And if the test was merely random, and not based on particular suspicion, is it not true a priori that the removal is not for "the efficiency of the service?"

Prohibited Personnel Practices

The civil service laws provide some elucidation of the "efficiency of the service" standard in the section on prohibited personnel practices. The Civil Service Reform Act of 1978 made it a prohibited personnel practice for a supervisor to take action against an employee "on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others." (5 U.S.C. 2302(b)(10)). These standards require demonstration of a nexus, or clear connection, that the off-duty conduct of an employee adversely affects his or her on-duty performance.

In 1981, the Merit Systems Protection Board decided that an employee's off-duty use of marijuana, while unlawful, did not have the requisite nexus with the efficiency of the service to support the agency's decision to remove the employee. In Merritt v. Department of Justice, 6 M.S.P.R. 585 (1981), the Board adopted a standard "that a nexus determination must be based on evidence linking the employee's off-duty misconduct with the efficiency of the service or, in 'certain egregious circumstances,' on a presumption of nexus which may arise from the nature and gravity of the misconduct." It may be noted that the two cases the Board referred to in its discussion of a presumptive nexus concerned manslaughter and child molestation.

Yet, in 1983, the Court of Appeals for the Second Circuit did not engage in a search for the nexus between an employee's duties as an air traffic controller and his recent conviction for off-duty possession and sale of marijuana. The Court was "persuaded by the FAA's simple but seemingly uncontrovertible reliance on the incompatibility of drugs with successful air traffic control." Borsari v. FAA, 699 F.2d. 106 (2d Cir. 1983). The Court found that the employee's removal promoted the efficiency of the service: "the confidence of the flying public depends upon absolute trust in the air system . . . it is clear that any connection with illegal, mind-altering substances is anathema to proper control of air traffic." And, the Court cautioned "the

phrase 'promote the efficiency of service' cannot be so limited as to require the Agency to wait for an on-the-job violation before dismissing an offending employee." Interestingly, the Court of Appeals judge in the Borsari case was Judge Irving R. Kaufman who later headed the President's Commission on Organized Crime.

The Borsari decision can be read as saying that a nexus can be presumed between off-duty drug use and certain critical jobs. It does not provide standards for determining what those jobs are. The Borsari case does not stand for the proposition that random, universal drug testing is appropriate.

Rehabilitation Act

Under the Rehabilitation Act of 1973 (29 U.S.C. 791), Federal agencies cannot discriminate against an individual with a handicapping condition. In 1977, the Attorney General determined in an opinion to the Department of Health, Education and Welfare (43 Op. Atty. Gen. No. 12) that alcohol and drug abuse were handicapping conditions under the Act. However, a handicapped individual is not protected under the Act unless he or she is able to perform the job with or without reasonable accommodation.

In 1978, Congress narrowed the definition of handicap to exclude "any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." (29 U.S.C. 706(7)(B)). Thus the dilemma for chemically dependent employees: they must "simultaneously prove that they are handicapped by their chemical dependency, but not so handicapped as to be unqualified to perform their job." Geidt, Thomas E., "Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights, 11 Employee Relations Law Journal 181 (1985).

Federal agencies are required to make "reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program." (29 C.F.R. 1613.704(a)). The Merit Systems Protection Board has interpreted this as not requiring an agency to provide a totally smoke-free work environment for an employee with chronic asthma, since the burden on the agency to accommodate the employee would be unreasonable. Pletten v. Department of the Army, 23 M.S.P.R. 682 (1984). However, the Merit Systems Protection Board appears to have a "do as I say, not as I do" attitude, since it announced on April 29, 1986, that after a transition period, smoking would be prohibited in their headquarters and regional offices.

Agencies are required to take specific steps to accommodate employees handicapped by alcoholism or drug abuse. One purpose of the Comprehensive Alcohol Abuse and Alcoholism Prevention,

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Treatment, and Rehabilitation Act of 1970 is "the development and encouragement of effective occupational prevention and treatment programs within the government . . . . " (42 U.S.C. 4541(b)(4)). To accomplish that goal, the Federal Personnel Manual requires that agencies offer rehabilitative assistance to employees handicapped by alcoholism or drug abuse before taking disciplinary action against the employee for performance problems related to the chemical dependency. The Merit Systems Protection Board has interpreted this to require an agency to offer an alcoholic employee rehabilitative assistance, including sick leave to participate in a rehabilitation program, before the agency can take disciplinary action against the employee for performance problems. Ruzek v. G.S.A., 7 M.S.P.R. 437 (1981).

The Rehabilitation Act serves an important purpose in assisting employees to overcome drug and alcohol dependence. It is expected that this law would require an agency to seek rehabilitation of an employee whose drug or alcohol dependence is identified through urinalysis, and would preclude an immediate removal action.

CONCLUSION

There are two reasons for testing employees for drugs: worksite safety and to deter off-the-job drug use. Since urinalysis cannot determine present intoxication in the way that breathalyzers can for alcohol, urinalysis is a poorly crafted method to insure worksite safety. Far better is for a supervisor to monitor the performance of the employees he or she supervises.

If the purpose is deterrence, scheduled testing will not work. Workers can avoid a positive result by avoiding drug use for a few days before the test.

Unannounced, random testing is the one method which can effectively scare employees away from using drugs. Such surprise testing is most offensive and demoralizing to employees and, hence, destructive to work productivity. There is substantial question as to whether any adverse action can be taken against an employee who tests positive under a random test. Further, there are severe technical problems with the testing.

There is also an important question of whether it is appropriate for the Federal government to use its employees as the guinea pigs in the war against drugs. The Federal government hires employees to provide important services to the American people, not to serve as a laboratory for social engineering. Indeed, even if every government worker who used drugs stopped, it would not make a dent in the flow of drugs coming into this country.

AGENCY RESPONSES TO SUBCOMMITTEE QUESTIONNAIRE

In February 1986 the Subcommittee sent a questionnaire to 75 Federal agencies and departments requesting information on their drug testing policies. Questions were asked on 11 basic issues; the questions and the agency responses are excerpted below.

1. During calendar years 1984 or 1985, did your agency conduct any urinalysis tests on civlian employees? Do you have plans to do so in 1986?

Department of the Air Force - No testing of civilian employees in 1984 or 1985. Plans to begin testing in 1986: "Civilian employee drug abuse testing program is currently being developed."

Department of the Army - Testing in 1984 and 1985 limited to treatment staff in Alcohol and Drug Counseling Centers and employees in the Forensic Drug Testing Laboratories. Authorized to begin testing civilian employees in designated "critical jobs" on February 10, 1986. Scheduled to begin testing in mid-June.

Department of Defense Components (Assistant Secretary of Defense)- Navy tested civilian mariners working for the Military Sealift Command who were in the Nuclear Personnel Reliability Program; Army tested civilian employees working in the forensic drug testing laboratories. Army plan to test employees in "critical jobs" in 1986 approved. Air Force and Navy will be submitting instructions for approval in 1986. No other DOD component expected to submit a program for approval in 1986.

Department of Justice - No comprehensive drug testing program for Justice Department employees at this time. Four components (Federal Bureau of Investigation, U.S. Marshals Service, Bureau of Prisons, and Offices, Boards and Divisions of the Department of Justice) conduct drug testing on employees on a case-by-case basis when there is "reasonable suspicion that an employee is using illegal drugs." The FBI conducted voluntary drug analysis tests on 14 employees during the years 1984 to 1985; the Marshals Service had five cases in those years; the Bureau of Prisons administered 10 drug tests. One test was administered by the Offices, Boards and Divisions of the Department of Justice.

In addition, applicants for the position of border patrol in the Immigration and Naturalization Service (INS) and hazardous duty positions in the Bureau of Prisons are subject to drug testing prior to employment. The INS administers approximately 1,500 tests a year nationwide. During 1984 and 1985, the Bureau of Prisons tested 3,451 applicants.

The Drug Enforcement Administration has no employee drug testing program at the present time, but plans to implement testing of all agent trainees and random testing of special agents and chemists.

Department of the Navy - Began urinalysis testing in November 1983

of civilian employees in critical positions on Military Sealift Command ships. In 1986, plans to expand to employees in critical jobs: law enforcement, fire fighting, air and sea traffic control positions, and positions in ships and aircraft.

Department of Transportation - No agency-wide urinalysis program in effect. The Federal Aviation Administration (FAA) is developing a formal program and is currently considering contract bids. In 1984 and 1985, while no formal program was in effect, the FAA "requested urine specimens from civilian employees whose occupations require periodic health evaluations as a condition of employment . . . only in those cases where there was probable cause in the form of credible evidence that the employees had engaged in substance abuse." The same procedure is being followed in 1986 until the formal program is established.

Department of the Treasury - (1) Secret Service: No routine testing of employees, but in 1984, 1985, and 1986 certain applicants and all probationary officers of the Secret Service Uniformed Division were subject to urinalysis incident to their regular probationary physical examinations. The urinalysis is administered by the District of Columbia Police and Fire Clinic.

(2) U.S. Customs Service: No testing of employees in 1984 and 1985. By memorandum dated May 8, 1986, Customs Commissioner William von Raab notified employees that the Service would begin testing applicants for certain positions (including employee applicants) in the summer of 1986.

Central Intelligence Agency - No formal program requiring urinalysis for drug screening purposes for Agency employees. On January 3, 1986, a trial program to screen all applicants for Agency employment began.

National Aeronautics and Space Administration (NASA) - No program requiring employees to undergo urinalysis for drug screening purposes. NASA does require urinalysis screening of all astronaut candidates at the Johnson Space Center.

Panama Canal Commission - On November 5, 1985, the agency began breath/blood testing for alcohol and urine testing for the presence of drugs.

U.S. Postal Service (USPS) - (1) Employees - no policy to test employees either systematically or randomly to detect drug abuse and no definite plans to do so. USPS does test employees whose performance deteriorates as part of fitness-for-duty examination. (2) Applicants - No national policy, but USPS does screen applicants for drug use in selected areas of the country.

Tennessee Valley Authority (TVA) - The Office of Nuclear Power implemented a drug screening program on August 1, 1985, that included urinalysis testing of certain employees: (1) prospective employees prior to employment and employees who are transferring

into the nuclear power program from other TVA organizations; and (2) in cases of suspected drug use or possession on TVA nuclear power and construction sites. TVA plans to implement random testing of current employees in 1986.

Veterans Administration - Authorizes urinalysis testing of employees at VA Drug Dependence Treatment Centers; discretionary and not uniformly administered.

2. Why did you begin a urinalysis testing program?

Department of the Air Force - "The increased use of drugs by all sectors of our society, combined with the reliance on civilian employees for increasingly more critical elements of the Air Force mission, has led to the need for testing civilian employees who occupy certain carefully identified critical positions."

Department of the Army - "(1) To assist in determining fitness for, appointment to, or retention in a critical job; (2) To identify drug abusers and notify them of the availability of appropriate counseling, referral, rehabilitation services, or other medical treatment; (3) To assist in maintaining national security and the internal security of the Department of the Army by identifying individuals whose drug abuse could cause disruption in operations, destruction of property, threats to safety for themselves or others, or the potential for unwarranted disclosure of classified information through drug-related blackmail."

Department of Defense Components (Assistant Secretary of Defense) - To "identify drug abusers who are working in critical jobs that can possibly effect national security, internal security of the Department of Defense, and public safety."

Department of Justice - "The use of illegal drugs by Department employees undermines both the stability of our law enforcement programs and the important principle that those who enforce the law must abide by it. For this reason, the Department must review and evaluate procedures, such as employee drug testing, that are designed to enhance the integrity and effectiveness of its law enforcement programs."

Department of the Navy - "To reduce the risks of drug abuse in certain jobs with critical functions affecting national security and the safety of personnel requiring an exceptional degree of reliability and dependability."

Department of Transportation - "While FAA had no evidence of widespread drug and alcohol abuse by its employees, there were occasional incidents that suggested that the agency was not immune from the drug and alcohol abuse problems that affect society as a whole. FAA implemented the program to assure (1) that employees in safety-related positions with drug or alcohol problems are identified and (2) that these employees do not perform their duties until FAA is satisfied that they no longer pose a risk to public safety."

Department of the Treasury - (1) Secret Service: Members of the Uniformed Division are in the same retirement system as the Metropolitan Police Department of the District of Columbia. The Board of Surgeons of the D.C. Police and Fire Clinic is authorized to medically examine probationary employees of the Uniformed Division to determine suitability for employment.

(2) U.S. Customs Service: The May 8, 1986, memorandum stated, "The extend of illegal drug use by Customs employees was not the reason for establishing this program . . . However, because our enforcement mission is drug interdiction, I feel it is absolutely essential to take protective measures against the threat of illegal drug use."

Central Intelligence Agency - No specific answer.

NASA - Astronaut candidates may be disqualified for "chronic use of any medication; any drug addiction or chronic abuse of alcohol; mental disorders requiring continued or intermittent medications."

Panama Canal Commission - "It became apparent that alcohol and drug abuse was affecting the safety of the Commission workplace . . . [and] that supervisors needed an additional tool for confirming suspicions of impairment and for taking corrective action. Decided to implement measures "to test apparently impaired workers for the presence of alcohol and drugs."

Tennessee Valley Authority - "Implemented its drug screening program as part of an effort by the nuclear power industry to regulate itself," in keeping with a proposed October 1982 "Fitness for Duty Rule" by the Nuclear Regulatory Commission. Also, guidelines issued by the Institute of Nuclear Power in January 1985 "recommended all prospective employees to be appropriately screened."

Veterans Administration - No specific answer.

3. What do you seek to accomplish through the use of urinalysis? What specifically does your urinalysis program test for?

Department of the Air Force - (1) To "assist in maintaining the national security and internal security of the Air Force by identifying employees whose drug abuse could cause disruption of Air Force operations, destruction of government property, threats to the safety of themselves and others, and unwarranted disclosure of classified information through drug-related blackmail"; (2) to "deter drug abuse by employees assigned to critical positions; assist in determining fitness for appointment to, or retention in, critical positions"; and (3) to "aid drug abusers identified through urinalysis testing by notifying them of the availability of appropriate counseling, referral, rehabilitation, or other medical treatment."

Air Force plans to test urine specimens for marijuana, cocaine, PCP, opiates (including heroin), amphetamines, and barbiturates; does not plan to test for alcohol. Type of screening intended to detect frequent and current use. The cut-off levels established by the Department of Defense for the initial screening test are 100 ng/ml for marijuana, 300 ng/ml for cocaine, 25 ng/ml for PCP, 300 ng/ml for opiates; 1000 ng/ml for amphetamines, and 200 ng/ml for barbiturates. Air Force reports that its testing methods will generally detect drug use if the urine specimen is taken within one to three days after drug use.

Department of the Army - Currently tests for marijuana and cocaine; alcohol is not included in the program. Army reports that its testing method will identify marijuana (the cannabinoid metabolite THC) up to 30 days for heavy users. Cocaine is detectable if sample taken within three to five days after use.

Department of Defense Components (Assistant Secretary of Defense) - "A DOD component is allowed to test for Marijuana, Cocaine, PCP, Opiates, Amphetamines, and Barbiturates. Alcohol is not part of the urinalysis testing program."

Department of Justice - No specific answer.

Department of the Navy - "Drug testing is intended to detect and deter drug use among employees in positions requiring an unusual degree of reliability for military readiness."

The Navy tests for opiates, marijuana, PCP, barbiturates, cocaine, and amphetamines, and expects to begin testing for LSD within the next few months. Navy also uses breathalyzer (blood alcohol content) tests on-post as part of the DOD drunk driver program. The Navy reports that "drug use can be accurately identified for an extended period of time after usage, however, drug use which occurred more than two to four days prior will normally not cause a positive test result because the Department of Defense set very high cutoff levels to be sure no false positive results would occur."

Department of Transportation - "The FAA envisions urinalysis as a tool for the detection of substance abusers and as an indicator to employees that substance abuse on-duty or off-duty is incompatible with service in the agency." The FAA contract has not been finalized, but it anticipates testing for any existing alcohol, cannabinoid metabolites [marijuana], a cocaine metabolite, phencyclidine [PCP], heroin, and amphetamines. The time interval for detection ranges from 24 hours to 30 days after drug use.

Department of the Treasury - (1) Secret Service: "The urinalysis program . . . is utilized by the Uniformed Division to evaluate a probationary employee's suitability for continued employment as a police officer with the Uniformed Division beyond the probationary year. The Clinic [the Board of Surgeons of the D.C. Police and Fire Clinic] does not routinely test probationary Uniformed Division employees for the presence of alcohol or marijuana." The Clinic tests for the following drugs: amphetamines, barbiturates, meperidine (Demerol), cocaine, codeine, dihydromorphinone, methaqualone (quaalude), methadone, heroin (as morphine), quinine, pentazocaine (Talwin), phencyclidine (PCP), phenothiazines, propoxyphene (Darvon).

(2) U.S. Customs Service: "We feel that a drug screening program will accomplish the objective of creating a drug free workforce. We feel that drug abusers will not apply for Customs positions, knowing of the program. In addition, current employees who may be drug users may stop using drugs because of the program." Customs plans to test for amphetamines, THC [marijuana], cocaine, opiates, and phencyclidine [PCP]. It states that most drugs remain detectable for 24-72 hours, while THC remains in the system longer.

Central Intelligence Agency - The trial program screens urine for narcotics, amphetamines, barbiturates, marijuana, PCP, and alcohol.

NASA - NASA is primarily concerned with chronic use of any medication which may be disqualifying under NASA Medical Standards (Classes I, II, and III) for pilot, mission specialist, and payload specialist. The urine screen tests for PCP and amphetamines but not for alcohol, marijuana, cocaine, or heroin. In addition, the urine is screened for a variety of prescription drugs, as well as for such substances as acetominophen, caffeine, and nicotine.

Panama Canal Commission - "Our purposes in conducting breath, blood and urine testing are to see if observed impairment is associated with the use of alcohol or other drugs, especially in hazardous occupations, to rid the workplace of safety hazards of alcohol/drug impairment, and to offer and assist in rehabilitation for alcohol/drug abusers." Breathalyzer tests are conducted to determine the blood alcohol level; employees who test positive on the breath test have the option of taking a blood test as well.

Urinalysis is used to test referred employees for cocaine, marijuana, and amphetamines. The Commission notes that breath and blood tests are accurate as long as alcohol is in the blood; urine screening will detect marijuana seven to 16 days after use, cocaine up to three days after use, and amphetamines up to seven days after use.

U.S. Postal Service - The specific drugs tested for are: amphetamines, barbiturates, benzociazepines, cannabinoids, cocaine, methaqualone, opiates, and PCP; no test for alcohol is done.

Tennessee Valley Authority - "TVA's goal is to provide reasonable assurance that the general public and TVA employees are not jeopardized by the use of drugs or alcohol in the nuclear work environment." [Urinalysis] is "used to supplement supervisory behavioral observation in detecting applicants and employees who abuse drugs and allow it to affect their job performance." TVA screens breath for alcohol, and screens urine for marijuana, cocaine, PCP, heroin, and amphetamines.

Veterans Administration - No specific answer, but guidelines state "care should be exercised to discriminate between medically prescribed and illicit drugs."

4. To what categories of employees do you administer these tests? Do you test both applicants and current employees? Are all applicants or employees tested, or are some tested on a random basis?

Department of the Air Force - Plans to test only employees who occupy positions designated by the Air Force as "critical":

"a. law enforcement;

"b. positions involving the national security or the internal security of the Air Force in which drug abuse could cause disruption of operations, destruction of property, threats to the safety of personnel, or the potential for unwarranted disclosure of classified information;

"c. positions involving the protection of property or persons from harm."

The Air Force notes that the designation of critical positions must be approved by the Assistant Secretary of Defense (Health Affairs). Only those civilian employees who occupy positions determined to be critical will be subject to urinalysis testing; both applicants for such positions and current employees who hold such positions will be subject to testing. The Air Force program includes plans for random testing.

Department of the Army - Plans to test employees in the following critical positions: aviation positions (air traffic control, pilot, aircraft mechanic), guard and police positions, personnel reliability program (chemical and nuclear surety positions); as well as those employees in the following programs who are already subject to drug testing: employees of alcohol and drug abuse prevention and control program (direct service staff), and all employees at Army forensic drug testing laboratories. Approximately 10,000 employees are currently eligible for testing. Testing of applicants for critical positions is mandatory, but optional for current employees. Incumbents may be tested:

1. on a random basis;

2. if there is probable cause to believe that they are under the influence of a controlled substance;

3. as part of a safety investigation authorized by DOD or DA if there is a reason to believe they were involved in the accident or mishap which is the subject of the examination.

Department of Defense Components (Assistant Secretary of Defense) - "DOD policy permits periodic testing on a random basis for employees working in jobs designated as critical jobs."

Department of Justice - The following components test employees on a case-by-case basis when there is "reasonable suspicion that the employee is using illegal drugs": Federal Bureau of Investigation, U.S. Marshals Service, Bureau of Prisons, Offices, Boards and Divisions of the Department of Justice. Two components presently test applicants prior to employment: Immigration and Naturalization Service for the position of border patrol, and the Bureau of Prisons for hazardous duty positions. In addition, the

Drug Enforcement Administration is in the process of developing a program to test both applicants and current employees.

Department of the Navy - Currently tests 250 civilian mariners working on ships with nuclear cargo. All applicants are tested and incumbents are tested periodically.

Department of Transportation - FAA kept no statistics on employees tested in 1984 and 1985. The proposed program will require urinalysis of "employees whose occupations require as a condition of employment periodic health evaluations." These include air traffic control specialists, inspectors, police, firefighters, mobile lounge operators, and Federal Air Marshals; grade levels range from GS-4 to GS-15. The proposed program would require both applicants and current employees to be tested; the FAA anticipates that approximately 24,000 employees will be tested annually. "The proposed program includes no randomization of employee selection . . . however, ad hoc urinalysis may be conducted when there is probable cause to suspect that an employee has engaged in substance abuse."

Department of the Treasury - (1) Secret Service: urinalysis tests are conducted on all probationary Uniformed Division officers who are authorized to carry firearms. Urine testing is also administered to Uniformed Division officer applicants as part of the routine pre-employment physical examination conducted by the Clinic on applicants who reside in the District of Columbia. There is no routine compulsory testing of current employees, and no testing of Service employees on a random basis.

(2) U.S. Customs Service: plans a phased-in approach. Beginning in mid-June (and dependent on the outcome of the National Treasury Employees Union litigation) applicants, including employees applicants for certain positions will be required to undergo urinalysis as a condition of employment. Positions to be included in the drug screening program include those with: "direct involvement in drug interdiction and enforcement of related laws; a requirement that the incumbent carry firearms; or, a requirement for the incumbent to handle classified material." Applicants for top management positions at the U.S. Customs Service will be covered, though it appears that the current incumbents will not.

Central Intelligence Agency - Trial program started to screen all applicants for agency employment.

NASA - Screens all astronaut applicant finalists (civilian and military) during the medical exam at the Johnson Space Center. Current NASA employees are not tested.

Panama Canal Commission - Tests job applicants who receive pre-employment physical examinations. Employees are tested if the supervisor detects common signs of intoxication (an "incident") or if the supervisor documents in writing an employee's deteriorating performance that appears to be caused by alcohol or other drugs.

An employee involved in an on-the-job accident will also be subject to alcohol/drug testing. It is anticipated that the number of employees tested each year may reach 30 to 40. No random testing is done.

U.S. Postal Service - Plans to require urinalysis tests of all applicants for Postal employment.

Tennessee Valley Authority - "Upon entry to the Nuclear Power program, all categories of employees in positions which require unescorted nuclear plant access are tested under our existing program." From August 1, 1985, to January 31, 1986, TVA tested 2,176 applicants or transferees. TVA plans to randomly test 1,400 employees in the next two years.

Veterans Administration - No specific answer.

5. How may positive tests have you had so far? What action do you take against employees who test positive for alcohol or drug use? If an initial test is positive, do you require a second test for confirmation?

Department of the Air Force - Has not yet tested any civilian employees. The Air Force policy will be to remove from the critical position any employee who tests positive on both the initial and confirming urinalysis test. The policy is not yet final on whether the employee would be reassigned, demoted, or separated from Federal service. No action is taken after an initial positive test, and all initial positive tests will be confirmed by a second independent and different test. The Air Force will test initially by radioimmunoassay (RIA); confirmation will be by gas chromatography/mass spectrometry (GC/MS). The same sample is used for both initial and confirming tests, under chain of custody procedures.

Department of the Army - Has had no positive test results to date [its civilian testing program is not yet fully implemented.] "Because of the critical nature of the positions identified and the condition of employment to remain drug free, employees who test positive will be removed from the critical position." After an initial positive test, the employee may be temporarily detailed to non-critical duties or placed on administrative leave, or temporarily suspended access to classified information. Confirmation by GC/MS is required before any permanent action is taken.

Department of Defense Components (Assistant Secretary of Defense) - "All urine specimens identified as positive by a field test must be sent immediately to a certified laboratory and tested using both the initial test and the confirmatory test. The certified laboratories are required to use radioimmunoassay (RIA) for the initial test and gas chromatography/mass spectrometry (GC/MS) for the confirmatory test."

Department of Justice - (1) Federal Bureau of Investigation: The FBI laboratory analyzes urine specimens by Gas Liquid Chromatography and Mass Spectrometry.

(2) U.S. Marshals Service: contract procedures analyze urine specimens by a Drug Screen 7427 panel process which incorporates two processes: a thin layer chromatography which is then confirmed by enzyme immunoassay. The test is repeated if positive.

(3) Bureau of Prisons: contractor uses thin layer chromatography as the basic screening procedure. Gas chromatography is used to confirm initial positive tests. Employees testing positive may elect to have a second test on the same specimen in a second laboratory.

(4) Offices, Boards and Divisions of the Department of Justice:

used an initial test of thin layer chromatography confirmed by enzyme immunoassay.

In testing applicants for employment, the Immigration and Naturalization Service's initial test uses thin layer chromatography confirmed by enzyme immunoassay. The Bureau of Prison's contractor uses thin layer chromatography for the initial test and a gas liquid chromatography to confirm all initial positives.

Department of the Navy - Reports that of the 1,901 tests of civilian employees conducted in 1983 and 1984, 21 tests were positive. Employees with confirmed positive tests are removed from the Personnel Reliability Program; no disciplinary action is taken after an initial positive test. A Navy Drug Screening Lab analyzes initial positive tests, using radioimmunoassay (RIA) and a gas chromatography/mass spectrometry (GC/MS) confirmation test.

Department of Transportation - Under the FAA's proposed program, employees with confirmed positive analyses during their periodic health evaluations will be removed from duty in their safety-related occupations. They will then be given one opportunity to participate in either an abatement or a rehabilitation/abatement program for no less than one year. During such a progam, the employee will be subject to random urine testing. If the employee tests positive while participating in an abatement or rehabilitation program, the FAA may separate the employee. No action will be taken against an employee unless both the initial and confirming tests are positive. FAA will require that confirmation analyses be run using gas chromatography/mass spectrometry (GC/MS).

Department of the Treasury - (1) Secret Service: No adverse action is taken against an employee who tests positive for drug abuse - in most instances the employee explains the positive test results (e.g. prescription from a physician). The Service views an initial positive result as a tool to identify possible areas of concern which warrant closer scrutiny. Initial tests for all drugs except cocaine and methadone are done by thin layer chromatography, and then all are tested by EMIT. If an initial test is positive, the laboratory is generally requested to confirm the accuracy of their finding; however, gas chromatography is not routinely used.

(2) U.S. Customs Service: Planned program includes an initial screen by an immunoassay, coupled with a confirmatory test using gas chromatography/mass spectrometry. Although the Customs Service response to the Subcommittee questionnaire takes a hard-line position -- "We feel that employees who occupy critical positions should be subject to removal from their positions if they are drug abusers." -- the May 8, 1986 memorandum to employees states "if you are tentatively selected but you subsequently decide not to undergo drug screening, your refusal will only result in a loss of consideration for the position. No other

action will be taken."

Central Intelligence Agency - The trial program uses thin layer chromatography and EMIT for initial analyses, with all positives confirmed by gas chromatography.

NASA - 45.5% of the astronaut candidates tested in 1984 and 1985 tested positive for one or more of the following substances: caffeine, nicotine, acetaminophen, salicylates, quinine/quinidine, and low levels of unidentified substances. No evidence has been found for barbiturates, major or minor tranquilizers, PCP, Quaaludes, pain relievers, amphetamines, or any other substance with abuse potential. The initial screen is done by thin layer chromatography. If a test needs to be repeated, the same sample is analyzed by gas chromatography.

Panama Canal Commission - As of February 28, 1986, 15 incidents had triggered referral for drug and alcohol testing. Four employees refused testing; of the 11 who were tested, nine (82%) were positive, one negative, and one voided due to a sample collection error. When the results of a test are positive, the supervisor is to offer the employee the opportunity to enroll in the Alcohol and Drug Abuse Rehabilitation Program. Any disciplinary or adverse action proposed for deficient work performance or behavior may be postponed for 90 days. If rehabilitation is going well, the pending action is cancelled after 90 days. If the employee refuses to undergo testing, or does not fully comply with the rehabilitation program, disciplinary action may be taken. The appropriate action may be taken after positive breath or blood tests, in the case of alcohol. In the case of other drugs, appropriate action may be initiated after either positive screening results or later quantifiable results. If the local screening (EMIT) results are positive, a second sample is provided to a laboratory in the United States for independent analysis using the EMIT and gas chromatography/mass spectrometry (GC/MS) methods.

U.S. Postal Service - For current fitness-for-duty examinations and in plans for applicant testing, will use EMIT procedure for initial test and if positive, automatically confirm using either gas or thin layer chromatography from the same urine specimen. If an employee is not fit for duty because of drug or alcohol involvement, he is referred to the Employee Assistance Program for counseling and rehabilitation.

Tennessee Valley Authority - Under the current testing program, tests are performed prior to employment, so positive test results cause the offer of employment to be withdrawn. If tests are for suspected use or possession on the job, disciplinary action up to and including termination is considered. In the proposed random program, should results come back positive employees will have the opportunity for a second test and be given an opportunity for rehabilitation and restoration.

Of the 2,176 tests which have been performed, 96 have been confirmed positive (4.4%). After an initial positive test, such as EMIT, further testing is performed at a contract laboratory using a different method. If this method shows a positive result, a confirmatory test using another method such as gas chromatography is also required.

Veterans Administration - "All positive tests are to be corroborated by at least one other test with another testing device or by another laboratory."

6. Who does the testing? Who does the analysis? Is it done by Federal employees or contractors? How much is the cost per test?

Department of the Air Force - At present, the Air Force Drug Testing Laboratory at Brooks Air Force Base, Texas; Army Drug Testing Laboratories at Tripler Army Medical Center, Hawaii, Fort Meade, Maryland, and Wiesbaden, Germany; and CompuChem Laboratories, Research Triangle, North Carolina, do testing of Air Force samples. Each laboratory analyzes the results of the tests it conducts. The staff of the Air Force and Army Drug Testing Laboratories is comprised of military members and Federal employees. Employees at CompuChem Laboratories are hired by that firm as contract employees. The Air Force presently has a rider to an Army contract by which CompuChem Laboratories conducts confirming gas chromatography/mass spectrometry tests; Air Force is in the process of obtaining a contract on its own.

Only samples which have initially screened positive are sent to CompuChem for confirmation by gas chromatography/mass spectrometry. For the confirmatory test, CompuChem Laboratories charges the Air Force $29.70 for marijuana, $44.70 for cocaine or amphetamines, and $45.00 for barbiturates and opiates.

Department of the Army - For accession testing, the sample will be taken by trained personnel designated by the commander. The tests for current employees will be done at the worksite, or other appropriate places the commander chooses. The supervisor or his/her designee will observe the taking of the sample and properly initiate the chain of custody required for all test samples. Guidelines clearly state that biochemical testing will be done with "maximum respect and concern for human dignity." The Army currently uses three Army forensic drug testing laborabories and one contract laboratory. CompuChem was the sole source contractor. They had been used for a number of years by the Navy and were the only laboratory with the technology to satisfy DOD guidelines and the capacity to meet the needs of the Army. The charge for initial screening of two drugs is $15.10. The charge for confirmation testing of THC [marijuana] is $20.25; confirmation testing of THC from Overseas Army laboratories is $29.70. Confirmation testing of BNZ [cocaine] is $35.00.

Department of Defense Components (Assistant Secretary of Defense) - The collection of specimens are normally handled by military and/or civilian personnel working in the drug and alcohol abuse prevention control office. Field testing of specimens must be conducted by a properly trained individual (military or civilian) and all laboratory testing must be by a certified laboratory. There are military and civilian employees working at the certified military drug testing laboratories. Presently CompuChem is [the] only contract laboratory analyzing urine specimens for the Army and Air Force.

Department of Justice - The Federal Bureau of Investigation's own laboratory analyzes urine specimens. The United States Marshals

Service contracts urinalysis to the Institute of Human Performance in Fairfax, Virginia, in conjunction with Roche Biomedical Laboratories. Testing for the Bureau of Prisons employees and applicants is contracted to PharmChem, Inc., in Menlo Park, California. Offices, Boards and Divisions of the Department of Justice reports that the Department's Public Health Facility has the test conducted by National Health Laboratory in Vienna, Virginia. Testing of INS applicants is contracted to the Roche Biomedical Laboratories, Inc., except in Alaska where National Health Labs is used.

Department of the Navy - Collection, handling, and shipping of samples is performed by Navy field activities. Analysis is performed by Navy Drug Screening Laboratories. All of these procedures are conducted under a rigid DOD-wide protocol. Neither testing nor analysis is currently contracted out.

Department of Transportation - In the proposed FAA program, the contractor will be responsible for all program activities, including the analyses of urine specimens. The cost per analysis is not known, since the winning contractor has not yet been selected. In all probability, the winning contractor will levy an additional charge for the GC/MS analyses required by FAA to confirm positive screening analyses.

Department of the Treasury - (1) Secret Service: Urinalysis examination of Uniformed Division employees is done by Roche Biomedical Laboratory. The D.C. Police and Fire Clinic collects the sample and forwards it to Roche for testing and analyses. The cost for the urine drug test is $11.00 and is paid by the Secret Service to the Clinic on a reimbursement basis. Further testing such as gas chromatography is extra.

(2) U.S. Customs Service: Did not specify whether testing would be done in-house or by contractors. The May 8, 1986, memorandum stated "it is our intention to use trained professionals who are experienced in collection and chain of custody procedures."

Central Intelligence Agency - "Our trial program utilizes the contract services of the outside laboratory that does all of our laboratory evaluations."

NASA - The urine sample is sent by the NASA Johnson Space Center laboratories to Methodist Hospital, Houston, Texas, which is the reference laboratory. The specimens are then sent to the toxicology laboratory at the Baylor College of Medicine, Houston, Texas. The charge to the laboratory branch is $80 per urine sample screen and is not assessed per each individual test. Positive results are validated by EMIT or gas chromatography at no extra charge.

Panama Canal Commission - During normal duty hours, when a supervisor identifies an employee for alcohol/drug testing, the supervisor takes the employee to one of the seven Occupational

Health Centers. The nurse on duty administers the breath test. If the employee consents to a blood test, he/she is taken to the local U.S. Army MEDDAC hospital/clinic to obtain the sample. In obtaining urine samples, supervisors of the same sex as the employee are expected to help the occupational health staff in ensuring that samples collected are not contaminated or altered in any way. If the incident or accident occurs during hours when the occupational health staff is not on duty, the employee is taken to the U.S. Army MEDDAC hospital/clinic emergency room to obtain all three samples.

The breath test is analyzed on the spot by the nurse. The blood sample is analyzed by a MEDDAC laboratory technician. The urine sample is first screened (EMIT) by laboratory personnel of the 193rd Infantry Brigade (Panama's) Alcohol and Drug Abuse Prevention and Control Program; a duplicate of the sample resulting in positive screening test is forwarded to CompuChem Laboratories, Inc. of Chapel Hill, North Carolina, for confirmatory testing and analyses (EMIT/GC/MS). CompuChem charges $30 per sample for GC/MS confirmation for THC and/or cocaine, and $45 per sample for GC/MS confirmation of all other drugs.

U.S. Postal Service - Any testing is done by physicians who are either employed by or are contractors to the Postal Service. The analysis is performed on a fee basis by a laboratory engaged by the post office sponsoring the test. Typically costs are $15 for the EMIT and $65 for confirmation.

Tennessee Valley Authority - Testing is performed both by TVA employees in the TVA Central Medical Laboratory and confirmatory testing by a contract laboratory, Allied Chemical Laboratories.

Veterans Administration - "All of the proposed urine tests will be coordinated with the Chief of Drug Dependence Treatment Center."

7. What specific evidence do you have of the accuracy and validity of the specific urinalysis testing procedure your agency uses?

Department of the Air Force - "The National Institute on Drug Abuse (NIDA) and almost all forensic toxicologists agree that the urine drug testing methodologies required by the Department of Defense are 'state of the art'. The tests employed have continued to withstand legal and scientific challenges."

Every laboratory certified by the Department of Defense to analyze urine for drugs is required to participate in an external quality control program provided by the Armed Forced Institute of Pathology (AFIP). Additionally, each laboratory is requird to maintain an internal quality control program consisting of standards and controls of at least 10 percent of the total number of urine specimens analyzed. "According to our internal and external (AFIP) quality control programs, we have never had a false positive [incorrectly identifying a negative "clean" specimen as positive] using the testing methodologies required."

A false negative is defined as a specimen which has drugs present, but the sample is called "negative" and is not reported to the field as positive. "According to our internal and external (AFIP) quality control programs, our laboratory has a 97.5 percent accuracy on identifying 'spiked' positive urine specimens, or a 2.5% false negative rate, using the testing methodologies requires. The Department of Defense has intentionally set decision levels for the prescribed drugs which allow for a certain percentage of false negatives to ensure that no false positives occur."

Department of the Army - "The scientific validity of the testing procedures has been tested by numerous courts martial proceedings, where forensic experts for both prosecution and defense argue the legal and scientific validity issues. Quarterly inspections by DA consultants in the areas of forensic science and legal aspects are required for continued DOD certification." The Army reports no false positives with current testing thresholds and GC/MS confirmation; also, no false negatives.

Department of Defense Components (Assistant Secretary of Defense) - Radioimmunoassay and gas chromatography/mass spectrometry are accepted by the scientific community as accurate and valid methods for conducting urinalysis drug testing. The results presented in numerous courts martial have been upheld as scientifically and legally supportable. The results of the external proficiency testing program conducted by the Armed Forces Institute of Pathology indicate that the laboratories have not reported a single false positive under the current testing system and there were less than 3% false negatives.

Department of Justice - (1) Federal Bureau of Investigation: The FBI reports that the accuracy of its tests (gas liquid

chromatography and mass spectrometry) virtually eliminates the possibility of false positives.

(2) U.S. Marshals Service: tests (thin layer chromatography confirmed by enzyme immunoassay) are reported to be 95 percent accurate.

(3) Bureau of Prisons: using thin layer chromatography confirmed by gas chromatography: "PharmChem Inc. reports that the average false positive rate is 0 percent and the false negative rate is *less than* 1 percent."

(4) Immigration and Naturalization Service: Roche Biomedical laboratory, using thin layer chromatography confirmed by enzyme immunoassay, reports 95 percent accuracy for this process.

Department of the Navy - "DOD regulations require two separate testing methods to ensure accuracy. Urine samples are initially screened by RIA to eliminate those containing no drugs of abuse. The RIA positives are rescreened using intervening water blanks to eliminate any possibility of carryover. Samples still screened positive are then confirmed using GC/MS, the industry standard for accuracy. Out of 4.5 million military and civilian samples tested in our labs the last three years, we have not experienced a single false positive. A false negative rate is not available because the cutoff levels prescribed by the Department of Defense for both RIA and GC/MS preclude reporting results below the cutoff levels. We expect a high number of false negatives (samples with drugs present, but not above required cutoff levels) to preclude any false positives. Each Navy Drug Screening Laboratory conducts an extensive internal quality control program to ensure accuracy and also participates in the Armed Forces Institute of Pathology Proficiency Program which includes both open (known to the laboratory) and blind quality control samples. Any discrepancies in the analysis of these quality control samples are immediately investigated to preclude either technical or human error."

Department of Transportation - Among potential contractors submitting bids to the Department, on screening analyses the average percentage of false positives was described as being about two percent. On GC/MS analyses, the average percentage of false positives was described as being zero. "The methodology to be used in the proposed program will depend on the contractor selected."

Department of the Treasury - (1) Secret Service: "Roche Laboratory stated that the Ciba product line which they employ is 95% accurate. Due to the fact that the thin layer chromatography test is subjective (i.e., the analyst must determine a positive or negative test) the degree of false positives is dependent on the judgment of the analyst. However, since all of the substances are retested by EMIT, the degree of false positives is greatly reduced. The Service has not encountered any instance in which a false positive has occurred; and has no information regarding the

occurrence of false negative results."

(2) U.S. Customs Service: "Since we have not yet commenced testing, we do not have first hand data on the accuracy and validity of the tests. However, our research into current technology, including discussions with subject matter experts, has led us to conclude that the tests are accurate and valid."

Central Intelligence Agency - No specific answer.

NASA - "A positive result is not reported by our screening method unless it is confirmed by an independent chemical method. Thus, there is no false positive reporting from thin-layer chromatography due to the confirmation requirement. We cannot estimate the percentage of false negatives since testing is performed on a one-time basis only, and separate, confirming tests are not performed on negative results for a cross-check. The Medical Sciences Division is mostly concerned with chronic medication use as noted. False negatives may occur due to an insufficient dose of the drug, a short half-life of the drug, and masking of the drug due to the presence of other drugs of higher concentrations."

Panama Canal Commission - Local testing equipment does not report false positives. Any positive urine sample is forwarded to CompuChem for confirmation. "CompuChem is reported to have 100% testing accuracy, with 0 false positives and 0 false negatives."

U.S. Postal Service - "The Postal Service has no independent scientific evidence about the accuracy or the validity of the the tests. We rely on the literature and on expert advice as to the accuracy and the validity of the EMIT test with automatic confirmation by another means. We intend to follow strict chain of custody procedures and verify the quality control of the laboratory with blind samples."

Tennessee Valley Authority - Relies on test manufacturer's determination of the accuracy and validity of the test.

Veterans Administration - No specific answer.

8. Are urinalysis tests given on a regular periodic basis, or on an aperiodic basis?

Department of the Air Force - Current plans are to provide both applicants and current employees in critical positions with advance written notice that they will be subject to urinalysis testing at any time. At this time, Air Force does not plan to require testing on a periodic basis; however, commanders may elect to test on a periodic basis.

Department of the Army - A test is required for selectees prior to appointment to the critical position. After appointment, tests may be conducted: (1) periodically without notice, on a random basis; (2) when there is probable cause; and (3) as part of an authorized investigation of a safety mishap.

Department of Defense Components (Assistant Secretary of Defense) - DOD policy requires all employees subject to testing to be informed, in writing, prior to an initial urinalysis test. Once informed that they are subject to testing, the testing can be conducted on a random basis, when there is probable cause, and as part of an authorized mishap or safety investigation.

Department of Justice - Four components test employees when there is a reasonable suspicion that the employee is using illegal drugs (Federal Bureau of Investigation, U.S. Marshals Service, Bureau of Prisons, and Offices, Boards, and Divisions of the Department of Justice.) Further, the Immigration and Naturalization Service and Bureau of Prisons test applicants for certain positions. The Drug Enforcement Administration anticipates testing all agent trainees at the time they report, and testing employees on a random basis.

Department of the Navy - Currently, samples are collected at annual physicals and when reporting or returning to a personnel reliability program ship.

Department of Transportation - Under the FAA's proposed program, specimens will be collected on a regular periodic basis unless there is probable cause to suspect substance abuse.

Department of the Treasury - (1) Secret Service: Urinalysis tests are given on a periodic basis to Uniformed Division probationary employees. The Service does not have any program in place for aperiodic, random testing of employees.

(2) U.S. Customs Service: The response to the Subcommittee questionnaire stated "although we are still planning this aspect of the program, we envision that applicants will be given advance notice of testing. For current employees, we anticipate that urinalysis tests will be administered on an unscheduled basis to randomly selected employees." The May 8, 1986, memorandum to employees states "when a candidate is tentatively selected for one of these positions, he/she will undergo drug screening prior to final selection, in the same manner as candidates who are required

to undergo a medical or background investigation."

Central Intelligence Agency - Trial program screens all applicants for agency employment. Signed informed consent is required of all applicants prior to the testing (which is conducted at the same time as the regular medical screening).

NASA - Urinalysis drug-screens are performed on all astronaut applicant finalists during their week of medical evaluations and interviews. No current NASA employees, including current astronauts, are tested on either a regular or periodic (with no warning) basis.

Panama Canal Commission - Urinalysis tests may be given as part of a pre-employment physical examination; following an observed incident in which the employee appears to be intoxicated or under the influence; or following on-the-job accidents.

U.S. Postal Service - "The Postal Service does not have a drug detection program using urinalysis for current employees." However, urinalysis may be required as part of a fitness-for-duty examination.

Tennessee Valley Authority - "Under the current program, tests are given prior to employment as part of the preemployment processing procedure. Our proposed random program will give advance notice to employees that they will be tested; however, they will not know the day or time they will be tested."

Veterans Administration - "Each Drug Treatment Center Director, in conjunction with the appropriate Personnel Physician, determines the necessity and frequency of urinalysis tests for the particular Center."

9. Please explain the nexus between off-the-job alcohol or drug use and employee performance in the job classifications subject to urinalysis testing.

Department of the Air Force - "The Air Force civilian drug testing program is based on the premise that there are certain jobs sufficiently critical to the Department of Defense mission or to the protection of public safety that should not be performed by employees who are potentially impaired because of drug abuse. The issue is not only how they are performing today, but what is the likelihood that they will continue to perform well in the future. Due to the critical nature of their job, evidence of drug usage is sufficient to remove a person from a critical position. The Air Force cannot wait until an employee causes irreparable harm to himself, others, or national security before we remove the employee from the critical position.

"Depending on such factors as the time at which a drug is taken, the amount of the drug taken, and the metabolism of the drug by individual, off-the-job drug use could render the employee impaired by the drug while on the job. It is well known from clinical observation that patients on PCP, amphetamines, barbiturates, opiates, and cocaine show adverse effects that would certainly affect job performance."

Department of the Army - "The requirements to refrain from using controlled substances and to submit to urinalysis are conditions of employment for persons employed in the specifically identified critical positions. The justifications for establishing these conditions of employment" are as follows:

(1) for the civilian treatment staff of the Alcohol and Drug Abuse Prevention and Control Program and civilian employees of the Army's Drug Testing Laboratories: "Testing of these jobs is critical to the continued credibility of the ADAPCP and the Army's biochemical testing program. While the job classes do not fall within the basic guidelines of DODD 1010.9, if the ADAPCP and DTL's are to function properly in assisting with identification and treatment of other military and civlian personnel, they must be certifiably drug free. Number of employees: Approximately 650 worldwide."

(2) for all jobs pertaining to aviation or aviation safety, including air traffic controllers, pilots, and a range of aviation mechanics and servicing personnel: "Duties of personnel in these jobs are directly related to the categories delineated by DODD 1010.9. The bulk of those duties assigned to aviation personnel require keen sensory perception and neuromuscular coordination. Drug use would have an adverse effect on these facilities and increase the potential for carelessness, accidents, and shoddy performance. Drug abuse could result in disruption of operations, damage or destruction of property, threats to safety, and loss of life. Number of employees: Approximately 2800."

(3) for all law enforcement positions, including police, guards, and security or administrative personnel whose duties are directly related to law enforcement: "Duties of personnel in this job class are clearly within the guidelines of DODD 1010.9. Incumbents must maintain a high standard of conduct at all times, and the use of drugs would interfere with or prevent effective performance of critical duties. In addition, it follows from the presence of the metabolic by-products of these drugs that the employee has either engaged in an illegal transaction in obtaining the drug, or is aware of the illegal possession or acquisition of drugs by others. This calls to doubt the credibility of the employee and his ability to perform the duties assigned, which would include protection of persons and property and security duties of the first magnitude. Employees in this class are expected to remain calm under pressure, think rationally and respond intelligently despite adverse circumstances, and deal effectively in interpersonal confrontations. They often work in isolated areas and many are armed. They must be drug free or they will be unable to perform the functions of their jobs, thus creating the possibility of theft, security breakdown, injury of self or others, property damage, and loss of life. Number of employees: Approximately 3700, plus a possible 3000 more local national employees in the Federal Republic of Germany who may not be eligible for testing due to Status of Forces Agreements."

(4) for jobs for which Personnel Reliability Program (PRP) special access certification is required, including supervisory personnel assigned to PRP, nuclear reactor operators, nuclear weapons technicians, chemical ammunition maintenance specialists, quality assurance personnel, material handlers, laboratory workers, and intrusion detection system maintenance personnel: "Personnel assigned to PRP positions are responsible for the custody, transportation, storage, maintenance, demilitarization, and security of nuclear and chemical surety materials. Failure to properly perform these responsibilities increases the risk of untoward incidents, unnecessary costs, and unsafe work environments. This could lead to the definite potential for unthinkable danger to the public, destruction of property, mission degradation, and major security problems. Drug abuse by personnel in these jobs poses a serious threat to the individual, fellow workers, and the surrounding community. Disruption of operations critical to defense, destruction of property, injury to persons, and disclosure of highly classified information could occur. Additionally, any internally produced incident involving these weapons would cause irreparable damage to DOD's credibility, worldwide, of being able to provide a safe and secure environment for these weapons. Hazards to those exposed to these materials are grave enough under extremely controlled conditions. The mere exposure to many of these materials is serious enough to require the wearing of protective clothing and the use of special protective equipment. The potential adverse effects which might occur if a nuclear or chemical weapon was compromised, damaged, or stolen are truly monumental. It is absolutely essential that personnel involved with these weapons be subjected to the most

rigorous tests of trustworthiness and stability. Number of employees: Approximately 2250."

Department of Defense Components (Assistant Secretary of Defense) - For civilian employees in critical jobs any effect on performance can severely jeopardize national security, the internal security of DOD, or public safety. Critical jobs come within one or more of the following categories: "(1) law enforcement; (2) positions involving the national security or the internal security of the Department of Defense in which drug abuse could cause disruption of operations, destruction of property, threats to the safety of personnel, or the potential for unwarranted disclosure of classified information; (3) jobs involving protection of property or persons from harm."

Department of Justice - "We note that the Department of Justice is a law enforcement agency with a priority commitment to the enforcement of laws governing the sale, possession and use of illegal drugs. The use of illegal drugs by Department employees undermines both the stability of our law enforcement programs and the important principle that those who enforce the law must abide by it."

Department of the Navy - "Whether drugs are ingested on or off the job, such use is totally incompatible with the complete reliability and accuracy of job performance required in critical jobs dealing with military systems and equipment such as nuclear weapons affecting safety of personnel. The kinds of functions civilian employees perform in the Department of the Navy require drug-free employees because the Navy is assigned a defense mission. The place where drugs are ingested is not the risk: it is the fact that the employee brings drugs in his or her system to the worksite. Any degree of drug use which would result in a confirmed positive drug test represents a risk that we cannot accept."

Department of Transportation - "The nexus between off-duty alcohol or drug abuse and the duties of employees involved in the National Airspace System has been recognized and confirmed by numerous Court and third party decisions. A most significant ruling was made by the U.S. Court of Appeals for the Second Circuit in the case of Borsari v. FAA [699 F.2d. 106 (2d Cir. 1983)]. The employee involved in the case was an air traffic controller who was removed for the off-duty sale and possession of marijuana and the possession of cocaine. In finding that the removal was taken to promote the efficiency of the service, the Court noted that the confidence of the flying public depends upon absolute trust in the air system. It is therefore clear, the Court stated, that any connection with illegal, mind-altering substances is anathema to proper control of air traffic. While [this case] only involves an air traffic controller, a similar argument could be made for other safety-related positions."

Department of the Treasury - (1) Secret Service: "The Uniformed

Division performs a variety of duties in connection with protection of the following: . . . (3) the President and members of his immediate family. . . . In addition, officers of the Uniformed Division possess authority similar to that of the Metropolitan Police of the District of Columbia, including the authority to make arrests and to carry weapons while off-duty in the District of Columbia. As law enforcement officers authorized to carry firearms, members of the Uniformed Division have a special obligation to comply with the law and must be physically able to respond to an emergency situation, which might involve the safety of the President of the United States, at any time."

(2) U.S. Customs Service: "It is Customs position that on or off duty use of illegal drugs is inconsistent with our prime enforcement mission of drug interdiction."

Central Intelligence Agency - No specific answer to this question, but the Agency does state "Positive findings are used for informational purposes only in our medical and security evaluation, and they would not be the sole criteria for refusing employment to any applicant."

NASA - No urine drug-screens are performed on current employees, thus there is no program to evaluate off-the-job alcohol or drug use and employee performance.

Panama Canal Commission - "The Commission has not performed any such [nexus] studies. However, cases of chronic abuse tend to surface in fitness-for-duty physical examinations, which are conducted for employees occupying positions having specific physical standard requirements. The acutely intoxicated employee tends to either not report for duty or demonstrates unusual behavior or deficient performance upon reporting for work."

U.S. Postal Service - "We have made no attempt to explain the nexus between off the job alcohol or drug use and employees performance. Employees whose performance deteriorates and management feels it may be due to an alcohol or drug problem, may be referred to our Employee Assistance Program. From there, the employee will receive a medical evaluation if needed, and further referral to rehabilitation centers for proper treatment for the condition and strong followup counseling at the EAP for an extended period of time."

Tennessee Valley Authority - Provided no specific answer but enclosed an article entitled "Drug Abusers on the Job," Journal of Occupational Medicine, Volume 23, No. 6, June 1981.

Veterans Administration - No specific answer.

10. What effect do you believe a urinalysis program will have on the morale and productivity of the workforce? What efforts has your agency made to work with employees on the development of a urinalysis testing program? Do you consider the establishment of a urinalysis program negotiable under the Federal Service Labor Management Relations Act (5 U.S.C. 7101 et. seq.)?

Department of the Air Force - "We believe that our urinalysis program will have a positive effect on morale by instilling confidence in our work force that fellow employees in critical positions who perform duties involving law enforcement, national security, and the protection of property and persons from harm will abstain from illegal drug use that could affect their performance. We also believe that our urinalysis program will deter illegal drug use by civilian employees both on and off the job and thereby increase employee productivity. We have provided the national offices of unions which represent affected employees an opportunity to provide their views and comments, and we will consider their input before taking final action on the civilian urinalysis program.

Air Force installations and unions at the level of recognition will subsequently engage in impact and implementation bargaining in effectuating the program; however, we do not consider the establishment of the program per se to be a negotiable matter under 5 U.S.C. Chapter 71."

Department of the Army - "The DA program is designed to meet the objectives of both DOD Directive 1010.9 and Interim Change No. I11 to AR 600-85. Meeting these objectives will assist in maintaining security, safety, and good order. Having a drug free workforce in these areas should increase their productivity and have a positive effect on morale and attitude of the civilian DA workforce, in general. The Army has seen such results with the testing program for our soldiers." No efforts were made to work with employees, "other than through normal staffing and coordination channels. Many of the personnel who were active in the development of the DA program are eligible for testing." The Army does not consider the establishment of the urinalysis program negotiable. However, "comments were solicited from unions with national consultation rights during the development of the program. The Army recognizes its duty to negotiate both the impact and implementation of this program."

Department of Defense Components (Assistant Secretary of Defense) - "Morale and performance should increase among individuals being tested. They will have more confidence and trust in each other to perform their jobs without the possible deleterious effect on national security or public safety. DOD Directive 1010.9 was issued after extensive review and coordination with all DOD components. The establishment of the policies in DOD Directive 1010.9 are not negotiable under the act cited above; however, we did solicit comments from unions with national consultation rights during the development of the Directive."

Department of Justice - No specific response.

Department of the Navy - "There have been no significant adverse morale consequences reported from the implementation of our drug testing program. Productivity is theoretically diminished to the extent that employees are not performing their normal functions while they are being tested; however, it is increased to the extent that with complete reliability and accuracy employees who use drugs are precluded from performing critical jobs. The drug testing program has the objective of maintaining military readiness and reliability, not just increasing work force productivity. We have not worked with employees on the development of our drug testing program; rather we gave employee unions an opportunity to present their views on the draft of our program. The establishment of a urinalysis program is not a negotiable matter."

Department of Transportation - "In February 1984, the FAA invited to Washington, D.C., a so-called diagonal slice of employees from all occupations to be covered by the Substance Abuse Control Program (SACP). This group discussed the concept of SACP and unanimously approved the agency's doing whatever was needed to eliminate substance abuse on- or off-the-job among FAA employees in safety-related occupations.

"The FAA, through the successful contractor, will work with management, unions, employee participation groups, and families of employees in assuring that all details of the proposed SACP are thoroughly understood. Already, the FAA Regional Offices and the FAA Headquarters have sponsored presentations by experts in the field to educate all employees in the dangers inherent in substance abuse. Consultants knowledgeable and experienced in the development of SACP's assisted the agency in developing the policy statement which is the foundation upon which the proposed SACP has been developed.

"The agency does not consider the establishment of the FAA's SACP to be negotiable under the Federal Service Labor Management Relations Statute (5 U.S.C. 7101, et. seq.). (Conflicts with management's rights to discipline, etc.)"

Department of the Treasury - (1) Secret Service: "The nature of the law enforcement duties and responsibilities of the Uniformed Division requires that all officers be able to perform their assigned duties without any drug induced impairment. Each employee is depended upon as a vital link in assuring the success of the Service's mission as well as the safety of fellow officers. Consequently, the urinalysis program described above has enabled Uniformed Division officers to have greater confidence that their fellow officers will physically be able to come to their assistance in case of an emergency and in this manner has had a positive influence on the morale of the Uniformed Division. Pursuant to Executive Order 12171, the Secret Service is not

subject to the provisions of the Federal Service Labor Management Relations Act."

(2) U.S. Customs Service: "While there may be some initial resistance to the drug screening program, efforts will be made to work with employees to gain greater acceptance for the program. Customs management has a unilateral right to establish a drug screening program as a condition of employement; however, certain procedural aspects may be subject to negotiation and will be handled through impact and implementation bargaining."

Central Intelligence Agency - No specific answer.

NASA - "Urine drug-screening is performed only on astronaut applicant finalists as part of their total medical evaluation. It is our judgment that this test has not affected the morale of the applicant groups. There is no plan under development to test current NASA employees."

Panama Canal Commission - "Since the inception of our testing procedures in November, we have already seen a sharp increase in the number of enrollees in the Rehabilitation Program. This would seem to indicate an increased awareness on the part of both supervisors and unions, both of whom make referrals to the program, and a concern for ensuring a safe and healthful work environment. Logically, productivity should be enhanced. We do not anticipate that our testing program will have any effect on the morale of the workforce.

"The breath and urinalysis testing program was discussed on a number of occasions with the Commission's labor-management Safety and Health Committee which has equal representation by labor and management representatives. It is our view that as a result of these discussions the exclusive representatives who participate on this committee gained a better insight as to the need for the measures. Indeed, their recommendations were considered and some were adopted. The committee has demonstrated a continuing interest in the program's success.

"It is the Commission's position that the decision to establish an alcohol/drug testing program is not negotiable, although the procedures and appropriate arrangements (impact and implementation bargaining) for the employees adversely affected are. In this respect, the Commission engaged in impact and implementation bargaining at the request of the exclusive representative of one of the bargaining units."

U.S. Postal Service - "We cannot speculate on the morale and productivity of the work force if subjected to a urinalysis testing program inasmuch as we have no such program at the present time."

Tennessee Valley Authority - "We believe the program will have an overall positive effect on morale and productivity. We feel that

the majority of our work force would like to see the drug abusers identified and either cleaned up or off the job so that the workplace will be safer and more productive.

"Although this is not a joint program, we have kept our bargaining unions well informed of the intent and application of the program. We have total support from them in the program. We have considered individual's concerns throughout the implementation of our existing program, and will continue all efforts to ensure a fair and reasonable program is maintained and future plans include the same considerations. TVA is specifically excluded from the provisions of the Federal Service Labor Management Relations Act, 5 U.S.C. 7103(a)(3)(E), and accordingly, the establishment of a drug program would not be covered by any requirements of that act."

Veterans Administration - No specific answer.

11. Under what authority or regulations do you plan to conduct urinalysis testing?

Department of the Air Force - DOD Directive 1010.9, "DOD Civilian Employees Drug Abuse Testing Program," April 8, 1985. The proposed Air Force regulation which will implement the civilian urinalysis program is still in draft form.

Department of the Army - DOD Directive 1010.9 and Interim Change No. I11 to AR 600-85. Army will require employees and applicants for critical positions to sign a consent form "Condition of Employment for Certain Civilian Positions Identified As Critical Under the Drug Abuse Testing Program," (DA Form 5019-R, Jan. 86)

Department of Defense Components (Assistant Secretary of Defense) - DOD Directive 1010.9.

Department of Justice - No specific answer.

Department of the Navy - DOD Directive 1010.9 and MSCINST 5510.98. The Navy requires employees and applicants for positions in the Personnel Reliability Program to sign a "Statement of Consent."

Department of Transportation - FAA Administrator's Policy Statement "Agency Policy on Substance Abuse", August 14, 1985.

Department of the Treasury - (1) Secret Service: "Government of the District of Columbia, Minimal Physical and Mental Requirements for Appointment to the Police and Fire Department;" and Uniformed Division Police Officers Manual.

(2) U.S. Customs Service: "To date, since we are still in the program development phase, we do not have internal policies under which we conduct urinalysis testing and take actions based on its results."

Central Intelligence Agency - No specific answer.

NASA - NASA Johnson Space Center documents 11569, 11570, and 11571 detail the relevant medical standards concerning drug and alcohol use for NASA Class I, II, and III medical exams, and the intent to carry out drug screening as part of the overall medical evaluation of each pilot, mission specialist, and payload specialist applicant finalist. The applicable standards are 4.1.6 (Chronic use of any medication may be considered disqualifying); 4.16.9 (Any drug addiction or chronic abuse of alcohol); and 4.16.11 (Mental disorders requiring continued or intermittent medications.) Responsibilities of the headquarters Medical Policy board and JSC Medical Board are detailed in NMI 1152.59B and JSCI 1152.3 respectively.

Panama Canal Commission - Panama Canal Personnel Manual, Chapter 792, "Alcohol and Drug Abuse Rehabilitation Program," as amended at Section 792.3-3.e; Memo to Supervisors and Managers, 10/15/85;

October 10, 1985 memo regarding alcohol/drug abuse prevention training for supervisors; Memo to All Employees, dated November 1, 1985 (English and Spanish); Letter to All Pilots, dated November 1, 1985; Guidelines and forms relating to testing procedures.

U.S. Postal Service - "Since we have no urinalysis testing program, we have no current regulations which describe such procedures."

Tennessee Valley Authority - TVA Division of Nuclear Power Procedure No. 0905.01.04 (Fitness for Duty Program, Alcohol and Drug Abuse Policy, Drug Awareness Program, Alcohol and Drug Screening Program), July 31, 1985.

Veterans Administration - Agency policy manual: MP-5, Part I, Chapter 792, Change 7, July 30, 1980.